**Bob Grimm and Rod Grimm, General Partners, d/b/a Grimmway Farms and d/b/a Grimmway Frozen Foods *and* General Teamsters & Food Processors Local 87, International Brotherhood of Teamsters, AFL–CIO; and Fresh Food & Vegetable Workers Local 78-B, UFCW, AFL–CIO, CLC.**

**Grimmway Farms d/b/a Grimmway Frozen Foods *and* Teamsters Local No. 87, AFL–CIO; Fresh Food & Vegetable Workers, Local 78-B, AFL–CIO, Joint Petitioner.** Cases 31–CA–19115, 31–CA–19165, 31–CA–19264, 31–CA–19388, and 31–RC–6862

June 24, 1994

## DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS STEPHENS, DEVANEY, AND BROWNING

On August 25, 1993, Administrative Law Judge Burton Litvak issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed limited exceptions and a supporting brief; the Respondent and the General Counsel each filed answering briefs; and the General Counsel filed a reply brief to the Respondent's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act in 1991 by refusing to rehire eight members of the Respondent's Arvin plant sanitation crew[3] who had been discharged approximately a year earlier for engaging in a concerted work stoppage. The complaint further alleges that the Respondent's statements to the alleged discriminatees at the time of the refusal to rehire constituted an independent violation of Section 8(a)(1).

The judge recommended that the former complaint allegation be dismissed on 10(b) grounds[4] and that the latter be dismissed on the merits. For the reasons set forth below, we find merit in the General Counsel's exceptions to the judge's disposition of these complaint allegations.

The judge found that the Arvin plant sanitation employees decided among themselves to demand time-and-a-half pay for working on Memorial Day 1990 and, when the Respondent refused their demand, they walked off the job as a group. The entire crew was terminated for their actions and the Respondent classified them as being ineligible for rehire because they had ''walked out of the job.''[5] During the last 6 months of 1991, at times when the Respondent was hiring, the alleged discriminatees each applied for reemployment with the Respondent. The Respondent's personnel clerk, Maricella Castillo, repeated to them the information in their personnel files, i.e., that they were ineligible for rehire because ''they had walked out'' the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by announcing and maintaining an overly broad no-solicitation rule, Member Browning finds it unnecessary to rely on the judge's citation to *Our Way*, 268 NLRB 394 (1983).

[2] In concluding that the Respondent violated Sec. 8(a)(1) by Co-owner Rod Grimm's statements to employees regarding postponing employee health insurance benefits, the judge noted that Grimm's translator, Rosa Rivera, was not called as a witness. Because the judge found that Rivera is a supervisor, the judge drew the inference that Rivera would not have corroborated Grimm's testimony had she testified.

The Respondent excepts, contending that Rivera is not a supervisor and that therefore it was error for the judge to draw the adverse inference. Although we agree with the Respondent that the record does not establish that Rivera is a supervisor, we nevertheless find that an adverse inference is warranted in the circumstances presented here.

The Board has held that ''[a]n adverse inference is properly drawn regarding any matter about which a witness is likely to have knowledge if a party fails to call that witness to support its position and the witness may reasonably be assumed to be favorably disposed to the party.'' *Property Resources Corp*., 285 NLRB 1105 fn. 2 (1987), enfd. 863 F.2d 964 (D.C. Cir. 1988). We note that several witnesses offered uncontradicted testimony that they were told Rivera was a supervisor; according to other uncontradicted testimony, Rivera had an office in a plant consisting mostly of line employees; and most significantly, Rod Grimm chose Rivera to interpret for him on an extremely important labor relations matter: the availability of employee health insurance.

We find the uncontradicted facts mentioned above indicate that Rivera may reasonably be assumed to be favorably disposed to the Respondent. Therefore, we agree with the adverse inference drawn by the judge regarding the Respondent's failure to call Rivera to testify, and we adopt the finding of the violation. See *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988).

[3] The eight former employees are Sergio Martinez, Luis Villa, Trinidad Duran, Pedro Zarco, Cayetano Suarez, Jorge Gonzalez, Herminio Romero, and Paulino Rojas.

[4] Sec. 10(b) provides, inter alia, ''[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.''

[5] There is no credible evidence in the record that the employees were told at the time of their discharge that they were ineligible for rehire. Therefore, we find it unnecessary to address the contentions of the Respondent that are based on the erroneous factual premise that the employees were told at the time of their discharge that they were ineligible for rehire in the future.

previous year.[6] The relevant unfair labor practice charge was filed on October 24, 1991.

Because the judge believed that Castillo's comments to the applicants could ''refer to any number of employee actions'' and were ambiguous, he held that there was no evidence within the 10(b) period that established the necessary elements of a violation. He therefore found that the General Counsel's case was ''inescapably grounded'' on the Memorial Day 1990 events and that those events, which occurred outside the 10(b) period, were essential ''missing proof'' necessary for finding a violation. The judge concluded that, in these circumstances, Section 10(b) precludes the use of the Memorial Day 1990 events and he dismissed the refusal to rehire allegations.

As the judge noted, it is well established that under Section 10(b) of the Act the Board may not give independent and controlling weight to events occurring more than 6 months before the filing and service of the charge. *Machinists Local Lodge 1424 v. NLRB*, 362 U.S. 411, 416–417 (1960). However, evidence as to such events may be considered as background to shed light on a respondent's motivation for conduct within the 10(b) period. Id. at 416; *Douglas Aircraft Co*., 307 NLRB 536 fn. 2 (1992).

Applying these principles here, it is clear that the October 1991 charge does not support an unfair labor practice finding based on the employees' discharge in 1990. A finding of such a violation would be ''inescapably grounded on events predating the limitations period.'' *Machinists Local Lodge 1424*, supra at 422.

The General Counsel does not, however, allege that the Respondent violated the Act by discharging the eight employees in 1990. Rather, he alleges that the violation consisted of the refusal to rehire them in 1991. All the elements necessary to establish prima facie a refusal to hire violation occurred within the 10(b) period. Thus, it is undisputed that the General Counsel has shown that, within 6 months of the filing and service of the charge, the Respondent was hiring, the eight employees applied for rehire, and these employees were denied employment. In addition, we find that the General Counsel has shown that, within the limitations period, the Respondent advised the employees that a work stoppage of the type traditionally protected by the statute was the reason they were not being hired. *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1962).

Support for this finding is found in Castillo's own testimony that she advised the applicants that they were ineligible for rehire because they ''walked out of the job.'' We do not agree with the judge that this comment could ''refer to any number of employee actions.'' Based on our review of the record, we find no event—other than the Memorial Day 1990 walkout—to which the statement could relate. And, as discussed above, although the Memorial Day 1990 walkout occurred outside the 10(b) period, it may properly be considered as background evidence shedding light on the meaning of Castillo's comment, which was made within the limitations period.[7]

In defense, the Respondent could have sought to show that the Memorial Day 1990 work stoppage was not protected, i.e., that the reason it gave for not rehiring the applicants was lawful.[8] The Respondent, however, did not do so, and the General Counsel's prima facie case therefore stands unrebutted.

The judge also found that Castillo's comments merely repeated what was in the applicants' personnel files and were ''too vague to have any sort of coercive connotation.'' As stated above, we do not agree with the finding that Castillo's comments were ambiguous or vague. The judge correctly found that Castillo was the Respondent's agent. Thus, we see no legal significance to the judge's finding that Castillo was merely repeating what was written in personnel files.

Accordingly, we find the Respondent, by Castillo's comments, violated Section 8(a)(1) by advising former employees that they were ineligible for rehire because they engaged in a concerted refusal to work. *Dentech Corp*., 294 NLRB 924 (1989).[9]

## AMENDED REMEDY

Having found that the Respondent additionally violated the Act by refusing to rehire former employees, we amend the judge's recommended remedy to include a cease-and-desist order, the posting of an appropriate notice, and an order to offer the eight discriminatees employment and make them whole for any loss of pay and other benefits suffered by them by reason of the failure to rehire on their applications. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[6] For the reasons the judge stated in fn. 25 of his decision, we adopt his finding that Castillo acted as the Respondent's agent within the meaning of Sec. 2(13) of the Act.

[7] We disagree with the judge's statement that the facts of this case are ''remarkably similar'' to those of *News Printing Co*., 116 NLRB 210 (1956). Instead, we find that case to be distinguishable. In *News Printing*, unlike the situation here, there was ''no evidence'' within the 10(b) period linking the employment decision in issue (denial of wage increases) to the employees' protected activities. Id. at 211. See *Paramount Cap Mfg. Co*., 119 NLRB 785, 786–787 (1957), enfd. 260 F.2d 109 (8th Cir. 1958).

[8] See, e.g., *Grinnell Fire Protection Systems*, 307 NLRB 1452, 1454–1455 (1992).

[9] Our holding is limited to cases where, as here, an employer specifically mentions an employee's protected conduct as the reason for not rehiring him.

For the reasons the judge stated in fn. 26 of his decision, we agree that the scope of the remedy should properly be limited to the eight employees named in the third consolidated amended complaint.

## ORDER

The National Labor Relations Board orders that the Respondent, Bob Grimm and Rod Grimm, General Partners, d/b/a Grimmway Farms and d/b/a Grimmway Frozen Foods, DiGorgio, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to rehire former employees because they engaged in a concerted refusal to work.

(b) Advising former employees that they are ineligible for rehire because they engaged in a concerted refusal to work.

(c) Refusing to retain employees who have been given leaves of absence because of their support for the Union.

(d) Announcing, and maintaining in effect, a union solicitation policy which prohibits employees from engaging in union solicitations during their own nonworking time.

(e) Issuing warning notices or, in any manner, disciplining employees for violating the unlawful union solicitation policy.

(f) Soliciting grievances and complaints from employees with the promise to make changes in order to discourage them from engaging in union activities.

(g) Informing employees that, due to the presence of the Union, it would have to postpone the implementation of an employee health insurance plan.

(h) Threatening employees with loss of jobs if they vote in favor of representation by the Union.

(i) Threatening employees with loss of hours and overtime if they vote in favor of representation by the Union.

(j) Informing employees that other employees will not be retained because of their support for the Union.

(k) Promising employees promotion to supervisory positions in order to induce them to agree to forego their support for the Union.

(l) Coercively interrogating employees with regard to their union sympathies and the union sympathies of their fellow employees.

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Offer Sergio Martinez, Luis Villa, Trinidad Duran, Pedro Zarco, Cayetano Suarez, Jorge Gonzalez, Herminio Romero, and Paulino Rojas employment in positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges and make them whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's discrimination against them in the manner set forth in the amended remedy section.

(b) Remove from its files any reference to the refusal to rehire Sergio Martinez, Luis Villa, Trinidad Duran, Pedro Zarco, Cayetano Suarez, Jorge Gonzalez, Herminio Romero, and Paulino Rojas, and notify them, in writing, that such has been done and that evidence of this unlawful conduct will not be used against them in any way.

(c) Offer Manuel Pelayo immediate and full reinstatement to the position of forklift driver at the Lamont facility, dismissing, if necessary, anyone who may have been hired or assigned to the position in which the Respondent refused to retain Pelayo on or about December 4, 1991, or, if that position no longer exists, to a substantially equivalent one, without prejudice to his seniority or any other rights and privileges, and make him whole for any loss of earnings and other benefits he may have suffered as a result of the Respondent's discrimination against him in the manner set forth in the amended remedy section.

(d) Remove from its files any reference to the refusal to retain in employment Manuel Pelayo, and notify him, in writing, that such has been done and that evidence of this unlawful conduct will not be used against him in any way.

(e) Remove the written warning notice which was given to employee Marcella Lopez Ruiz on or about November 27, 1991, and any reference to the discipline, from its files and notify her, in writing, that such has been done and that the written warning will not be used against her in any way.

(f) Preserve and, on request, make available to the Board or its agents for inspection and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Arvin and Lamont, California facilities Spanish and English copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 31 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the third consolidated complaint is dismissed insofar as it alleges violations of the Act not specified in this decision.

IT IS FURTHER ORDERED that the election conducted on May 8, 1992, in Case 31–RC–6862 is set aside and that Case 31–RC–6862 is severed and remanded to the Regional Director for Region 31 to conduct a second election when he deems the circumstances to permit the free choice of a bargaining representative.

[Direction of Second Election omitted from publication.]

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to rehire former employees because they engaged in a concerted refusal to work.

WE WILL NOT advise former employees that they are ineligible for rehire because they engaged in a concerted refusal to work.

WE WILL NOT refuse to retain employees who have been given leaves of absence because of their support for the Union.

WE WILL NOT announce, and maintain in effect, a union solicitation policy which prohibits employees from engaging in union solicitations during their own nonworking time.

WE WILL NOT issue warning notices or, in any manner, discipline employees for violating the unlawful union solicitation policy.

WE WILL NOT solicit grievances and complaints from employees with the promise to make changes in order to discourage them from engaging in union activities.

WE WILL NOT inform employees that, due to the presence of the Union, we would have to postpone the implementation of an employee health insurance plan.

WE WILL NOT threaten employees with loss of jobs if they vote in favor of representation by the Union.

WE WILL NOT threaten employees with loss of hours and overtime if they vote in favor of representation by the Union.

WE WILL NOT inform employees that other employees will not be retained because of their support for the Union.

WE WILL NOT promise employees promotion to supervisory positions in order to induce them to agree to forego their support for the Union.

WE WILL NOT coercively interrogate employees with regard to their union sympathies and the union sympathies of their fellow employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Sergio Martinez, Luis Villa, Trinidad Duran, Pedro Zarco, Cayetano Suarez, Jorge Gonzalez, Herminio Romero, and Paulino Rojas employment in positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges, and WE WILL make them whole for any loss of earnings and other benefits they may have suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the refusal to rehire Sergio Martinez, Luis Villa, Trinidad Duran, Pedro Zarco, Cayetano Suarez, Jorge Gonzalez, Herminio Romero, and Paulino Rojas, and notify them, in writing, that such has been done and that evidence of this unlawful conduct will not be used against them in any way.

WE WILL offer Manuel Pelayo immediate and full reinstatement to the position of forklift driver at the Lamont facility, dismissing, if necessary, anyone who may have been hired or assigned to the position in which we refused to retain Pelayo on or about December 4, 1991, or, if that position no longer exists, to a substantially equivalent one, without prejudice to his seniority or any other rights and privileges, and WE WILL make him whole for any loss of earnings and other benefits he may have suffered as a result of our discrimination against him, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the refusal to retain in employment Manuel Pelayo, and notify him, in writing, that such has been done and that evidence of this unlawful conduct will not be used against him in any way.

WE WILL remove the written warning notice which was given to employee Marcella Lopez Ruiz on or about November 27, 1991, and any reference to the discipline, from our files and notify her, in writing,

that such has been done and that the written warning will not be used against her in any way.

BOB GRIMM AND ROD GRIMM, GENERAL PARTNERS, D/B/A GRIMMWAY FARMS AND D/B/A GRIMMWAY FROZEN FOODS

*Margaret D. Hume, Esq.*, for the General Counsel.
*James Winkler, Esq. (Atkins, Adelson, Loya, Rund, & Romo)*, of Cerritos, California, for the Respondent.
*Fritz Gustav Conle*, Union Representative, of Salinas, California, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Pursuant to an unfair labor practice charge in Case 31–CA–19115, filed by General Teamsters & Food Processors Local 87, International Brotherhood of Teamsters, AFL–CIO and Fresh Fruit & Vegetable Workers Local 78-B, UFCW, AFL–CIO, CLC (Local 87 and Local 78-B and jointly called the Union), on October 24, 1991; an original and first amended unfair labor practice charge in Case 31–CA–19165, filed by the Union on December 10, 1991, and January 31, 1992, respectively; an original and first amended unfair labor practice charge in Case 31–CA–19264, filed by the Union on February 27 and April 27, 1992, respectively; and an unfair labor practice charge in Case 31–CA–19388, filed by the Union on May 18, 1992, the Acting Regional Director for Region 31 of the National Labor Relations Board (the Board) on July 14, 1992, issued a third consolidated amended complaint, alleging that Bob Grimm and Rod Grimm, General Partners, d/b/a Grimmway Farms and d/b/a Grimmway Frozen Foods (Respondent) had engaged in acts and conduct violative of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). On May 13 and 14, 1992, the Union filed timely objections to conduct allegedly affecting the results of a representation election, involving certain employees of Respondent, in Case 31–RC–6862, and, on July 31, 1992, the Acting Regional Director for Region 31 issued an order consolidating the objections to the representation election and the third consolidated amended complaint allegations and issued a notice of hearing on the matters. Respondent timely filed an answer, essentially denying the commission of any of the alleged unfair labor practices. Thereafter, on August 18–21 and September 9–11, a trial on the above matters was held before me in Bakersfield, California. At the trial, all parties were afforded the opportunity to examine and to cross-examine all witnesses, to offer into the record any relevant evidence, to argue their legal positions orally, and to file posthearing briefs. The latter documents were filed by counsel for the General Counsel and by counsel for Respondent and have been carefully examined. Accordingly, based on the entire record,[1] including the posthearing briefs and my observation of the testimonial demeanor of the several witnesses, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, jointly owned by Bob Grimm and Rod Grimm, is a partnership, duly operating under the laws of the State of California, with places of business in Arvin and Lamont, California, at which locations it is engaged in the processing, packaging, and nonretail sale of frozen fruits and vegetables. In the normal course and conduct of its aforementioned business operations, Respondent annually sells and ships goods and products, valued in excess of $50,000, directly to customers located outside the State of California. Respondent admits that it is now, and has been at all times material, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### II. LABOR ORGANIZATION

Respondent admits that Local 87 and Local 78-B each is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

#### III. ISSUES

The third consolidated amended complaint alleges that Respondent engaged in various acts and conduct violative of Section 8(a)(1) and (3) of the Act including refusing to retain an employee in his position in the shipping and receiving department because of his support for the Union and disciplining an employee for assertedly violating an overly broad union solicitation policy. The consolidated amended complaint also alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act by maintaining in effect an overly broad union solicitation policy, which prohibited employees from soliciting for the Union during work hours and break periods; by, in June through December 1991, refusing to rehire eight former employees because they had engaged in protected concerted activities while employed by Respondent on the Memorial Day holiday in 1990; by threatening employees with loss of overtime hours and a reduction in work hours, a loss of jobs, and delayed rehiring of strikers if the employees voted in favor of union representation; by informing employees that they would not receive health insurance benefits because they engaged in union activities; by informing employees that it would not retain an individual because of his support for the Union; by informing employees that they would not be rehired because they engaged in protected concerted activities; by promising an employee a promotion if he rejected the Union as the employees' bargaining representative; and by interrogating employees about their union or other protected concerted activities. Respondent denies commission of any of the aforementioned alleged unfair labor practices and, with regard to the alleged unlawful refusal to rehire eight former employees,

[1] At the hearing, counsel for Respondent offered portions of the representation case transcript as R. Exh. 9, and the record was held open to permit receipt of said transcript portions with the understanding that Respondent and the Charging Party would reach a stipulation as to the relevant pages. Apparently, there was no agreement on such a stipulation, and counsel for Respondent filed a motion, seeking admission of the entire transcript but drawing my attention to only selected pages. In the foregoing circumstances, I have received the entire transcript but have considered only those pages specified by counsel in his motion.

contends that consideration of such as an unfair labor practice is barred by the Section 10(b) of the Act statute of limitations.

## IV. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *The Facts*

#### 1. Background

The record establishes that Respondent is a partnership owned by Bob and Rod Grimm; that it is engaged in the harvesting, packing, processing, and marketing of vegetable and fruit products, with carrots, which account for in excess of 70 percent of its sales volume, being its primary product; and that Respondent maintains three processing plants in California, one in Lamont and two in Arvin, and an administrative office in DiGorgio, which is located almost equidistant between Lamont and Arvin.[2] At the Lamont facility, at which between 300 and 500 employees work, after removal of their tops, carrots are sorted according to size, washed, and packaged. The main Arvin facility (the Arvin plant) at which approximately 400 employees work, is comprised of five buildings, and carrots, green beans, and bell peppers are processed and packaged at this location. The other Arvin facility, located on Malaga Road (the Malaga Road facility) is a carrot processing and frozen storage facility; no more than 10 or 15 individuals work at this location. The record further establishes that hiring for both facilities is done at Respondent's administrative office in DiGorgio at which personnel clerks perform almost all the hiring functions. Valerie Rew, Respondent's director of personnel, maintains her office at the DiGorgio office facility.

Union activity was ongoing at Respondent's Lamont and Arvin facilities during the summer of 1991, with such culminating on August 21, 1991, with the filing of a representation petition in Case 31–RC–6860 by the Independent Union of Agricultural Workers, Local 2344, International Brotherhood of Painters & Allied Trades, AFL–CIO, CLC and, on September 4, 1991, with the filing of a representation petition in Case 31–RC–6862 by the Union. The rival representation petitions were consolidated by the Board, and, after the Acting Regional Director for Region 31 issued a Decision and Direction of Election on November 22, 1991, the representation election, in the consolidated cases, was scheduled for December 17, 1991. However, after the Union withdrew its request to proceed, based on the unfair labor practice charge in Case 31–CA–19115, the election was canceled. Subsequently, the Union filed a new request to proceed, and, after the petition in Case 31–RC–6860 was withdrawn, the representation election in Case 31–RC–6862 was rescheduled for, and held on, May 8, 1992.

#### 2. The refusals to rehire

Paragraph 7 of the third consolidated amended complaint concerns Respondent's alleged refusal, during the last 6 months of 1991, to rehire eight individuals because they had engaged in protected concerted activities while previously working for Respondent. In this regard, the record establishes that 11 individuals, employed on the Arvin plant sanitation and maintenance crew, were scheduled to work on the 1990 Memorial Day holiday. Eight of the employees (Sergio Martinez, Luis Villa, Trinidad Duran, Pedro Zarco, Cayetano Suarez, Jorge Gonzalez, Herminio Romero, and Paulino Rojas), the alleged discriminatees,[3] testified at the hearing and, according to their uncontroverted and corroborative account of the events of that day, at approximately 4 p.m., prior to commencing their work that night, the entire crew met and discussed that the production workers had been given the day as a holiday and that, rather than receiving double time or time-and-a-half for working that day, each would be paid at his normal wage rate, and all decided that they would threaten to ''go home'' if they were not paid at a higher wage rate for their work that day. Accordingly, after working approximately 2 hours, the entire maintenance crew met with their supervisor, Javier Juarez, in a cafeteria and, according to Jorge Gonzalez, ''we told him to pay us time-and-a-half . . . or else we would leave.'' Juarez replied that he could not make any decision himself on their wages for the day and requested that, while he spoke to his superiors at the facility and received an answer to their demands, they continue working. The employees agreed and worked for another hour. Thereupon, Juarez met with the entire crew again, informed them that he had been unable to reach any of his superiors and that nothing could be done that day with regard to their demands and, according to Cayetano Suarez, said ''that whoever wanted to could stay and whoever didn't could go.'' Herminio Romero testified that, as the entire crew was ''all in agreement,'' they then all said ''let's go,'' ceased working, and left the plant. There is no dispute that the maintenance department employees' work stoppage lasted only for the remainder of their shift that night and that, when the entire crew reported for work the next night, all were collectively terminated by Respondent; that, on the inactive employee worksheet,[4] for each of the discriminatees, which Ruben Oliva, the sanitation supervisor at the Arvin plant, filled out immediately after the discharges, Oliva wrote ''no'' next to the category, ''Quit. . . . Is employee rehirable,'' and wrote, in explanation, ''employee walked out of the job;'' and that, in the computer record subsequently maintained by Respondent for each discriminatee, next to the category, termination code, is the number ''4,'' which, in Respondent's terminology, means no rehire status.[5]

[2] Lamont and Arvin, which are located near Bakersfield, are approximately 5 miles apart.

[3] At the hearing and in her posthearing brief, counsel for the General Counsel argues that I should view the maintenance crew, all of whom were discharged by Respondent at the same time, as a class; however, as will become clear, the only members of the so-called class, who were actually denied reemployment during the 6-month period preceding the filing of the unfair labor practice charge in Case 31–CA–19115.

[4] This form is utilized by Respondent for all sorts of employee absences from work and the reasons for such.

[5] There is no dispute that, on being terminated, all the alleged discriminatees immediately went to the administrative office in DiGiorgio to get their final checks. Two, Martinez and Zarco, testified that a personnel clerk named ''Marta,'' who shall be discussed infra, said that they had been fired for engaging in a ''strike.'' However, the testimony was directly contradicted by alleged discriminatees Villa, who recalled Marta as only saying that she had been instructed to give them checks, Gonzalez, who said no one spoke to the group at the office, and Duran, who said the group had no conversation with Marta, only telling her they were there for their final checks.

Approximately 13 months later, in June or July 1991, inasmuch as Respondent was hiring at the time, Trinidad Duran went to Respondent's administrative office, in DiGorgio, to seek reemployment. He filled out an employment application and spoke to one of the female personnel clerks,[6] who was responsible for processing employment applications and who he knew as ''Marta.''[7] According to Duran, Marta checked the computer, asked Duran to follow her to an inside office, ''and she told me that I couldn't have any employment in any part of the company because of what had happened the year before.''[8] Two other discriminatees, Sergio Martinez and Luis Villa, together reapplied for jobs with Respondent in October 1991. As he was uncertain as to the date, Martinez' pretrial affidavit, in which he recalled October 14 as the date he and Villa went to Respondent's office to seek new employment, was admitted into the record as ''past recollection recorded.'' Martinez testified that the personnel clerk, to whom they spoke, was ''Marta,'' who he described as having blond hair and being 30 years old and ''not too big or too short.'' Marta gave each an employment application form, and, after they returned the completed application to Marta, she advised them to telephone the office as to possible hiring. Two or three days later (October 18 as set forth in Martinez' affidavit), he and Villa returned to the office and again spoke to Marta, who, according to Martinez, said she would ''check the computer. And she displayed our record and said we would not have work there again.'' During his testimony on counsel for the General Counsel's case-in-chief, Luis Villa recalled that, on going to Respondent's office to seek reemployment, he and Martinez completed employment applications and spoke to the personnel clerk Marta, who he recalled as being a light-skinned Latin person, thin, and with black hair and as working with Maricella Castillo. Told to return in order to check on job availability, Villa and Martinez returned to the office 2 days later, and, according to Villa, ''Marta told us that there was [an order] in the computer . . . that they couldn't give us work there because of the strike that we had done and that we would never again have work.'' However, while testifying during rebuttal, asked by me if, in fact, Marta had used the word strike, Villa said, ''no'' and that Marta's actual words were, ''For the problems that had happened.''

According to Cayetano Suarez, subsequent to his discharge, he submitted new employment applications to Respondent on three different occasions, with the last time being December 1991, a time when Respondent was hiring workers. On that occasion, Suarez testified, he spoke to the personnel clerk, named Maricella, who told him ''We can't take you because you're one of the ones who did a strike.'' Pedro Zarco testified that, in September 1991, he ventured to Respondent's office in order to seek work, filled out an employment application, and was told by the personnel clerk Marta[9] to return the next day. According to Zarco, he did so, and Marta said she would check the computer file on him, ''and she told me I had a bad record. And that's why they couldn't give me work any more in the plant, because of what happened before.'' Two other alleged discriminatees, Herminio Romero and Jorge Gonzalez, went together to Respondent's DiGorgio office in October 1991, seeking reemployment. Each completed an employment application and was told to check with the office if any job openings existed. After a month and aware that Respondent was hiring, they returned to the office, and a personnel clerk, named Marta, informed them that their applications had been lost. According to Romero, Gonzalez asked if there was a problem. Thereupon, Marta went into a small, backroom, spoke on the telephone, returned, and ''said I'm sorry but you guys cannot work . . . because of the problem we had had.'' According to Gonzalez, subsequent to completing employment applications, when he and Romero returned to Respondent's office, the personnel clerk Marta checked in the computer; took them to a separate room, and said there was ''no more work there, because what had happened with the strike.'' During cross-examination, Gonzalez changed his testimony, stating that what Marta said was that he wouldn't be rehired because he had ''abandoned'' work. Then, he changed his testimony again, reiterating that Marta had used the word, ''striking.'' Thereupon, the witness was confronted with his pretrial affidavit in which he did not use the word ''striking.'' Finally, alleged discriminatee Paulino Rojas testified that, in November 1991, he went to the DiGorgio office and filled out an employment application and that, since that time, no one has contacted him for work.

Maricella Castillo testified, during direct examination, that she worked in Respondent's personnel and payroll departments in the period June through December 1991; that, during said time period, she handled numerous job applications; that, although she knew Martinez, Villa, Duran, and Gonzalez by sight, she could not recall handling their employment applications or those of Zarco, Suarez, Rojas, or Romero during the latter half of 1991; and that no one named Marta worked with her in the office. Further, Castillo specifically denied telling any employee that he was ineligible for rehire because he had engaged in a strike or because he had engaged in a concerted refusal to work. During cross-examination, Castillo testified that Eva Jimenez worked as a personnel clerk with her during the above time period and that they had the same scope of authority. With regard to checking the computer for past employment with Respondent, Castillo stated that when applicants answer affirmatively to the employment application question regarding past employment with Respondent or ''if we seem to think that they have . . . we look up their application.'' Asked the procedure if termination code ''4'' appears, Castillo replied, ''Then I can tell them that they're not rehirable'' without

[6] The record establishes that Respondent's personnel clerks are the only representatives of the Employer with whom prospective employees meet during the employment process. Thus, the clerks give employment applications to the applicants and receive the completed forms; answer questions regarding job availability, take identification photographs and give identification cards to the employees, inform applicants of their hire, and send them to their work location.

[7] Duran described ''Marta'' as being short, thin, between 28 and 30 years of age, and wearing glasses. He added that Marta was not Maricella Castillo, one of the personnel clerks in the DiGiorgio office.

[8] During cross-examination, Duran admitted that, on his 1991 employment application, he gave an ''emergency in Mexico'' as the reason he left his previous job with Respondent and that such was correct. During redirect examination, Duran stated that the emergency occurred after his termination.

[9] Marta was the personnel clerk who had checked his original employment application and sent him to work and who was between 27 and 30 years of age, slightly overweight, and had black hair.

checking with her supervisor, Sue Kelly. Asked if she ever examines the applicant's personnel file as to the reason for not being eligible for rehire, Castillo responded that such depends on the applicant's desire; if the applicant asks, ''I'd pull out their employee file,'' and, if the reason is there, ''I would tell them.'' Castillo averred that she had a vague recollection of one of the group of alleged discriminatees asking about why he was not eligible for rehire. In that event, the procedure is ''there is a hall that separates the lobby from . . . everybody else. So what we'd do is I'd ask the person to come into the hall, and then I'd tell them, 'You know, you're not rehirable.''' Thereupon, after being shown several of the alleged discriminatees' inactive employee worksheets, Castillo admitted that several did reapply for jobs; that they previously had ''walked out'' was the reason for their no rehire status; that ''they probably did'' inquire as to why they were not eligible for rehire; and that ''it's possible'' she told the alleged discriminatees that they were not eligible for rehire because they had walked out the previous year.

Eva Jimenez testified that she worked in Respondent's administrative office as a personnel clerk from June through mid-October and, thereafter, as the benefits coordinator. Jimenez, who was identified by Luis Villa, during rebuttal, as the personnel clerk Marta, described the personnel clerks' role in the hiring process as, after accepting job applications, ''we would hire people as they were needed throughout the shed.'' Elaborating, Jimenez said that her supervisor, Sue Kelly, would assent to the hiring, and the clerk would then contact the employee to return to Respondent's office. Then, ''we would . . . proceed with offering them what the position was, what it paid, explain it to them . . . then we would fill out their [tax forms and] I.D. pictures would be given out. We would issue them a handbook, and they were to read that . . . and we would send them out to work after that.'' While unable to recall the exact date, Jimenez testified that she ceased working as a personnel clerk in the second or third week of October and received no employment applications after October 14. Jimenez denied knowing any of the alleged discriminatees; however, when asked if it was possible that she looked at their employment applications, she replied, ''I could have.'' Further, when asked if she ever checks past employee inactive worksheets, Jimenez stated, ''If they asked why they had a no rehire, then we would tell them why.'' As to where such was done, ''I take them out to the hall and explain to them they have no rehire status.'' Finally, Jimenez denied ever telling applicants that they could not be rehired because of a strike and stated that no rehire status based on walking off the job is ''common'' for Respondent.

3. Respondent's alleged unlawful no-solicitation rule

Paragraph 6 of the third consolidated amended complaint concerns Respondent's maintenance of an allegedly unlawful no-solicitation policy and two separate instances of allegedly unlawful conduct. The first allegation concerns current employee Maria DeBedolla, who works at the Arvin plant sorting carrots and testified that, one afternoon shortly after the Union's recognition campaign began in August 1991, her supervisor, Corina Sierra, who, Respondent admitted, is a supervisor within the meaning of Section 2(11) of the Act, approached and pulled her out of her sorting line and, ''outside of the department'' where the two were alone, ''she [asked] me . . . if I knew that during work hours I couldn't talk about the union. . . . She told me that she didn't want me to converse with my friends at the plant about the union, that she didn't want the union to come in. . . . She [asked] me if I wanted the union to enter. I said yes. She told me she didn't. . . . She told me that she didn't want me speaking in the plant with my co-workers about the union.'' During her testimony, Sierra, who recalled such an incident occurring in November or December 1991, stated that she observed DeBedolla talking and not working and that ''we don't mind if they talk, just as long as they do their job.'' Accordingly, she approached the employee, and ''I took her outside and brought it to her attention she was talking too much on the line; she wasn't doing her job.'' DeBedolla did not deny the conduct and said, ''All right.'' Sierra recalled nothing more about the conversation and denied mentioning the Union, breaktimes, or working hours. During cross-examination, Sierra recalled repeating the work rule to DeBedolla that ''they're allowed to talk just as long as it doesn't interfere . . . with their work.''

The second incident involves current employee Marcella Lopez Ruiz, who works as a sorter on line 4 at the Arvin plant. According to Ruiz, while working on the morning shift on November 27, she was called to the supervisor's office by Eleno Cuevas, the foreman, who, the parties stipulated, is a supervisor within the meaning of Section 2(11) of the Act. On entering the office, Ruiz observed that Cuevas and Maricella Zaragosa, an employee who performs interpreting work, were there. According to Ruiz, Cuevas said, ''I called you into the office because somebody called . . . that you were talking on the line about the union with another woman. And you know that right now is bad, because here it's prohibited to speak about the union during work hours.'' Ruiz asked for the name of the informer, but Cuevas refused to divulge the person's identity. Then, ''he told me he would give me an oral warning but to please not do it again.'' At that point, Eddie Rosson, the production manager at the Arvin plant and an admitted supervisor within the meaning of Section 2(11) of the Act, entered the office and asked what was going on. Cuevas explained ''that they had called me because I was talking about the union and that he was going to give me an oral warning.'' Rosson responded that the warning should be in writing and told Maricella to write it in English. Thereupon, the latter drafted a written warning in English, showed it to Cuevas, and asked if it was correct. Cuevas said, yes, and said to Ruiz, ''it's the same thing I just repeated to you.'' Rosson then examined the disciplinary notice and explained Respondent's policy to Ruiz—''He told me that you couldn't talk about the union during work hours or during break because it was during the time that the company was paying. Only during lunch or after I got off.''[10] Rosson added that the warning notice would remain in her personnel file for 6 months if she behaved. The warning notice, General Counsel's Exhibit 4, reads as follows: ''They talked to me in the office, about she was talking with other people at the High Grader, about the Union and specifically to get more signatures against the Company in regular work time, not on lunch time.'' During cross-examination, Ruiz

[10] According to Ruiz, employees are paid for break periods, and ''the only thing they take out is the half hour for lunch.''

admitted speaking to a coworker about the Union that morning but denied soliciting signatures or leaving her work station in order to speak to the other worker.

There is no dispute that an incident, involving Ruiz, occurred. According to Eddie Rosson, on returning from a meeting at another building, he happened to observe that a meeting was ongoing in the production office between Eleno Cuevas, Maricella Zaragosa, the raw product coordinator, and employee Ruiz. Rosson entered the office and asked what was going on, ''and Eleno Cuevas responded that he was reprimanding an employee for leaving [her] work station and entering another work station during . . . normal working time.'' Rosson turned to Ruiz and asked if this was true, and, assertedly, Ruiz admitted the allegation. Rosson then asked why, and she replied that she ''was talking to employees on the other line, trying to get them to sign union cards, and I asked her if she knew that she was not to leave her work station for any reason other than to go to the bathroom unless she asked for permission . . . and she said she was not aware of that.'' Ruiz added that she had a right to speak to employees about the Union, and Rosson reiterated the above ''work policy'' and said that, if she needed to speak to employees at another work station, she should do so ''only during your lunches, breaks, before and after work, during worktime our primary function here is to achieve our work goals.'' Cuevas interjected that this should be a verbal warning, but Rosson asked that the warning be put in writing so Respondent would have ''some reference'' if Ruiz repeated the misconduct. Further, testifying that he did not see General Counsel's Exhibit 4 until a later time, Rosson denied any instructions to Cuevas to give Ruiz a written warning—''I just asked him to put something in writing stating that we had counseled the employee.'' In support of this assertion, notwithstanding that it was produced pursuant to a subpoena for written reprimands, Rosson testified that General Counsel's Exhibit 4 was not forwarded to Respondent's personnel office, which would have been the standard procedure for a written warning; rather, it was retained in a ''back-up employee file to keep copies of information on employees in regard to safety incidents or anything like that.'' Finally, Rosson stated that what Ruiz violated was Respondent's policy against ''leaving the work station'' and that Respondent has no policy against prohibiting employees from discussing union affairs during work hours—''I have no way of controlling talking anyway. So as long as it doesn't interfere with work.'' During cross-examination, Rosson averred that the only reason he retained the warning notice was because Ruiz signed it.

During his direct examination, Eleno Cuevas testified that the meeting on November 27, 1991, was as a result of Ruiz asking people to sign union cards and ''bothering'' new employees about the Union. According to Cuevas, he told Ruiz that he couldn't prohibit her from talking to the people but ''the problem is that she would jump the line . . . she kept changing positions, and I wanted her to stay in the one position.'' Then, Rosson came in and asked what was going on, and Cuevas explained ''what was going on the line and he did not want to have a problem.'' Cuevas added that Ruiz admitted engaging in the disciplinary conduct, and what was explained to her was put into writing—''That we had talked so that she could understand us, that we don't have problems of her talking with the people; the problem is that she jumps the line when we have each person designated to work.'' During cross-examination, asked if Zaragosa was told what to write on General Counsel's Exhibit 4, Cuevas admitted that he and Rosson told her what to write on the reprimand—''Eddie Rosson and I were talking.'' He further admitted that Rosson was present when Maricella Zaragosa drafted General Counsel's Exhibit 4 and denied that Rosson ever instructed him not to consider the document as a disciplinary warning. Asked if Rosson instructed him to place the warning in writing, Cuevas said, yes, and added, ''We had to put it in writing because of what was happening. . . . It wasn't the first time. We didn't want this to happen again.'' He added that Rosson was aware that the time, meaning the preelection period and the ongoing union campaign, ''was difficult for us.'' Finally, Cuevas confirmed that Rosson told Ruiz that the warning would remain in her personnel file for 6 months.

4. The Manuel Pelayo leave of absence

Paragraph 8 of the third consolidated amended complaint alleges that Respondent refused to retain employee Manuel Pelayo in its shipping and receiving department because of his support for the Union. In this regard, the record establishes that, until November 18, 1991, Pelayo had been employed as a forklift cargo driver and loader in the shipping and receiving department at the Lamont facility at which Mathias Hernandez is the shipping supervisor and Jose Diaz is the night shipping supervisor.[11] Pelayo testified that, as he had worked for companies whose employees were represented by unions, he spoke to coworkers about the Union ''in the way that the union was better for us as a company''; that he was ''a little more'' vocal than other employees on the subject; and that, while he never wore a union button or distributed union literature, he had separate conversations with Hernandez and Diaz during which he expressed his belief that the Union would be beneficial because of the increased benefits. The record reveals that, in September 1991, Pelayo had been convicted of driving while intoxicated and was sentenced to serve time in the Lamont jail and that, in late October or early November, Pelayo learned that he was to begin serving an 18-day jail sentence[12] on November 18. According to the alleged discriminatee, from the end of October until on or about November 15, he sought permission from Hernandez for a leave of absence in order for him to serve his jail sentence. During one conversation, Pelayo informed Hernandez that he had been caught driving under the influence and, in another, while the two were alone in the shipping department office, he told Hernandez ''that I had to go do 18 days in jail and I needed permission for the 18 days and that when I came back if I would have my job. He said yes.''

Pelayo testified that he began serving his sentence on November 18, was released on December 4 at 1:30 a.m., and, later in the morning, telephoned Hernandez at the Lamont facility and inquired as to his job. Hernandez replied that ''it

[11] Respondent admitted that both Hernandez and Diaz were supervisors within the meaning of Sec. 2(11) of the Act.

[12] Pelayo's term in jail was to be 27 days; however, due to overcrowding in the jail, the custom in the Lamont criminal court system is to reduce jail sentences by one-third. Presumably, Pelayo would have been informed of this practice by his attorney.

was slow.'' Pelayo said he wanted his job back, and the supervisor instructed him ''to check the following week.'' Thereafter, on the following Monday, Pelayo again telephoned Hernandez, and, according to Pelayo, Hernandez again said ''to check again later because it was slow.'' Two or three days later, in the morning, Pelayo went to the Lamont facility and confronted Hernandez outside his office, and ''I asked him what was the reason why . . . he wasn't giving me my job, if he had another person in my place.'' Hernandez responded that someone had replaced him as the forklift driver but ''that he was only going to be there for two or three days only.'' Pelayo said that he wanted the work, and Hernandez again said it was ''very slow'' and suggested that Pelayo seek unemployment. Immediately after speaking to Hernandez, Pelayo went to the DiGorgio office and spoke to Valerie Rew, the director of personnel, about not being able to return to work, and, later that same day, he returned to the Lamont facility and again spoke to Hernandez, saying he wanted to speak to Mike Skaggs, the operations manager at the Lamont facility. Thereupon, Pelayo met with Hernandez and Skaggs in the latter's office. Pelayo testified, ''I told Mike . . . that I had asked Mathias for permission and that he had told me when I came back I would have my job.'' Hernandez responded ''that he did not understand that I asked for 18 days. . . . I said he knew perfectly. On several occasions I told him it was 18 days . . . and he heard me perfectly.'' Skaggs then interjected ''that they were changing systems and that . . . Mathias had said . . . I had quit.'' Pelayo said that Hernandez was lying and ''he knew I had asked for permission.'' There was no reply, and Skaggs ''only said they were very sorry but . . . they couldn't do anything.''

Counsel for the General Counsel argues that Respondent's failure to return Pelayo to work was motivated by his support for the Union. In this regard, Miguel Garcia, a current employee in the shipping department at the Lamont facility, testified that, in late November 1991, he was acquainted with Pelayo and was aware he was serving a jail sentence. He testified further that, a week before Pelayo was scheduled to be released, he had a conversation with Jose Diaz, the night shipping supervisor, in the shipping office at approximately 9 p.m. ''I . . . asked [Diaz] what was going to happen with Pelayo when he got out of jail.'' Diaz replied ''that Mathias had told him that Bob or Mike had said that they weren't going to give him work because he was talking about the union too much.'' Garcia stated that he did not reply and left the office. Fernando Romero, a current employee in the shipping department, testified to a similar conversation with Jose Diaz. According to him, one afternoon in early December with Pelayo about to complete his jail sentence, just before the lunch break, he was with a group of five other employees at a table in the shipping area and saying to Antonio Contreras, the individual who had replaced Pelayo, that his job was about to end with Pelayo coming back. At that point, Diaz, who must have overheard Romero's remark, approached and said that Pelayo was not coming back. Romero asked why, and Diaz said that ''Mathias Hernandez says he's not going to come back because he talks about the union too much.''[13]

Shipping Supervisor Mathias Hernandez testified that Friday, November 15, 1991, was the last day Pelayo worked for Respondent and that he (Hernandez) spoke to Pelayo outside the shipping office. According to Hernandez, ''[Pelayo] told me that he had to go to court; he had some problem with the law and he had to find out if he was going to pay the fines or was going to go to jail. He . . . wasn't sure whether he was going to go. . . . He asked me if he could have some time. I didn't know if I could or not. I asked him specifically if he knew how long it was going to take. He said he wasn't sure, probably about eight days. . . . I told him when he was sure, to let me know.''[14] Denying that he even gave Pelayo permission to be absent for 8 days, Hernandez further testified that Pelayo failed to report for work the following week; that, in midweek, unaware where Pelayo was but recalling their Friday conversation, he asked Jose Diaz to call the local jail in order to ascertain if Pelayo was there; that Diaz subsequently reported that the jail had no record of the incarceration of anyone named Pelayo;[15] and that another forklift driver was then hired on a permanent basis. Thereafter, Hernandez continued, in early December, Pelayo came to the plant and the two spoke in front of the shipping office. Pelayo told Hernandez that he had been released from jail and ''said that he was ready to work, and I told him that I had replaced him . . . with another forklift driver.'' Hernandez recalled that Pelayo ''wasn't too pleased'' with what he had been told and that, later in the day, he attended a meeting in Mike Skaggs' office with Pelayo present. According to Hernandez, ''Mr. Pelayo told Mike that . . . he thought we had an understanding that he had [a leave of absence] and the should be able to come back to work. . . . Mr. Skaggs asked me if I actually gave him a leave of absence, and I told him no'' and added that they had been un-

[13] Jose Diaz denied having either of the alleged conversations. Further, he stated that Miguel Garcia is Pelayo's brother-in-law and quit his job with Respondent and that Fernando Romero was laid off.

The ''Bob,'' to whom Diaz referred in his asserted conversation with Garcia, apparently was Robert Giragosian, the individual in charge of Respondent's fresh produce division. He testified and denied telling anyone that Pelayo could not return because of his support for the Union.

[14] Asked if he had authority to grant a leave of absence, Hernandez replied, ''Yes, I did. Up to two weeks.'' He denied any authority to grant a longer leave of absence. He was corroborated, in this regard, by Valerie Rew, who testified that ''[supervisors] can grant a leave of absence for up to two weeks. Anything higher than that, they generally contact me, and I check with the general manager of the division.'' Contradicting Rew and Hernandez were Supervisors Socorro Montes and Corina Sierra, both of whom, under questioning by me, admitted that they have authority to grant leaves of absences, that, depending on the situation, they are permitted to grant such leaves for longer than 2 weeks; and that they can do so without first checking with higher management. However, it appears that Rew's testimony, on this point, is consistent with her testimony during the representation case hearing, which was held in mid-September and prior to the Pelayo absence.

[15] Diaz corroborated Hernandez that the latter asked him to call the local jail to find out if Pelayo was incarcerated there. Diaz testified that he did so and was told that no one, under that name, was in custody at that facility.

able to locate Pelayo in jail.[16] Finally, Hernandez admitted being aware of Pelayo's prounion sympathies and failed to deny informing Jose Diaz that Pelayo would not return because of his support for the Union.

The record evidence establishes, and there is no dispute, that Valerie Rew acted promptly on Pelayo's complaint about not being returned to his job on being released from jail. Thus, according to Rew, she immediately contacted Hernandez, who said that Pelayo had been in jail and had not returned to work. Rew told him that Pelayo believed that he had been granted a leave of absence and that Hernandez was aware he would return. She asked if Hernandez had any documentation, and the latter said there was none as he believed Pelayo would ''get back to him as far as the leave'' and had not done so. Based on what he told her, Rew concluded that Hernandez ''did give [Pelayo] some time off'' but was unsure how long. Accordingly, Rew telephoned Skaggs and, with Hernandez in Skaggs' office, told them her feeling ''that there was some type of a misunderstanding on both parts possibly'' and asked if either objected to placing Pelayo elsewhere. Neither did.'' Subsequently, in mid-December, after Pelayo executed a document, Respondent's Exhibit 3, stating that he had been ''granted a leave of absence for one (1) week''[17] and that what had occurred was merely the result of a ''misunderstanding,'' he was given a sorting job at the Arvin plant and began working there at the same wage rate as he had received at Lamont.

5. Allegedly coercive statements and interrogation

Paragraph 9 of the third consolidated amended complaint contains allegations of coercive statements and interrogations by various agents, supervisors, and management officials of Respondent commencing at the start of the Union's organizational campaign in August 1991 and continuing to shortly before the May 8, 1992 representation election. Thus, paragraph 9(a) alleges that, in August, a labor relations consultant, employed by Respondent, solicited grievances from employees, thereby implicitly promising them improved terms and conditions of employment. In this regard, Jeffrey Green, Respondent's general counsel, testified that Respondent utilized the services of a labor relations consultant, Jose Agraz, in late August 1991 and that Agraz met with groups of employees for ''perhaps three or four days.''[18] Employee Calixto Orellana, who works in the sanitation department at the Arvin plant, testified that, in the third week of August during the Union's organizing campaign, he attended an afternoon meeting, at which between 100 and 125 employees were present, in the cafeteria for line 3. The meeting was conducted by a man named Jose, who said ''that he had been hired by the company to explain to us the campaign for the union. . . . He said that the union would cause ruin within the company and that . . . the employees . . . would become enemies. . . . He asked the people . . . to explain the problems and he would then relate them to the . . . boss and he would try to resolve it.'' Corroborating Orellana, Arvin plant maintenance employee, Francisco Villalobos testified that, in August, he attended an employee meeting in the line 3 cafeteria at which between 55 and 100 employees were present. It was conducted by a Latin man of medium height and approximately 35 years old. ''He said he was representing the boss and wanted to know why they were unhappy, what problems they had. To tell him and . . . he would go and tell the boss,'' who would ''try to solve the problems.'' The speaker continued, imploring the employees not to sign anything or to become committed to a card and saying ''that Mr. Grimm was going to talk to the employees and try to resolve the problems.'' A third employee, Victoria Ramirez, who works on line 2 at the Arvin plant, testified that she also attended an employee meeting one morning, at the end of August—when the Union commenced distributing flyers outside the plant. A 30-year-old Latin man, who introduced himself as a representative of Respondent, spoke and asked ''what problems did we have, that the owner was very busy. He didn't know what's happening with us. Maybe he would report it and see what he could do for us.'' Respondent called no witnesses to controvert the foregoing testimony.

Paragraph 9(e) of the third consolidated amended complaint alleges that one of the owners of Respondent, Rod Grimm, unlawfully informed employees that they would not receive health insurance benefits because of the Union. In this regard, Rod Grimm testified that, in May 1991, prompted by ''what . . . our competitors in the field were offering their employees,'' Respondent began considering providing health insurance benefits for all employees. According to Grimm, he asked Valerie Rew to provide him with options, and he consulted with accountants and attorneys. The latter consultations were ''very early in September'' and, in view of the filing of the representation petition, in Case 31–RC–6860, on August 21, concerned whether Respondent could lawfully implement a health insurance plan; Grimm requested a written legal opinion addressing Respondent's concerns. Meanwhile, after a supervisor approached Grimm and informed him that there had been numerous requests by employees for meetings with him, Grimm decided to hold a series of worker meetings and, within a month, conducted 12 to 15 such meetings. He testified that there was no format to them and that he usually listened to the comments of the assembled employees and, through an interpreter, answered their questions. He added that the topics generally were wages, health insurance, paid holidays, and others.

Two employees testified with regard to meetings, at which Grimm spoke and which they attended. Maria DeBedolla testified that, in about the beginning of September 1991, after the commencement of the Union's election campaign, she attended a meeting, with only four other employees, conducted by Grimm, and ''[the owner] . . . told us that he knew that we were trying to involve the union . . . because we wanted

[16] Michael Skaggs testified, during cross-examination, that he ''vaguely'' recalled the meeting in his office and that, rather than concerning whether Hernandez had granted a leave of absence to Pelayo, ''there seemed to be a disagreement between Manuel and Mathias regarding the length of time that [Pelayo] thought he was granted.''

[17] Rew testified that the language of R. Exh. 3 ''was done in conjunction with [Sue Kelly] . . . and I just gave her my input.'' However, Rew specifically denied knowledge of the source of the ''one week'' language, stating that Kelly ''may have put the one week in there, in her interpretation of what had happened. I just gave her some of the basics, and she formulated it.'' Sue Kelly, the personnel payroll supervisor, testified that she and Rew drafted the document, but she could not recall the source of the information contained in it.

[18] The parties stipulated that Agraz acted as an agent of Respondent within the meaning of Sec. 2(13) of the Act.

insurance. And we answered more or less. And he said that he didn't think that we needed a union representation for insurance.'' At that point, according to DeBedolla, she interjected that the employees had appealed to the Company on three occasions for insurance and there had been no response. Grimm denied ever seeing such appeals, said he was talking to them because Rosa Rivera, his interpreter, had informed him that the employees wanted insurance, and added ''that he had already had about six months of reviewing a plan that would be convenient for us employees'' but could not now give to them because of the Union. Continuing, Grimm said he would continue to seek a good health insurance plan for the workers, but ''that he believed we didn't need a strange person to represent us. . . . He said that he needed to wait, but that the union had not given him enough time to put in the plan.'' During cross-examination, asked by me if Grimm had said both that Respondent had been planning to give health insurance to the employees but could not because of the Union and that Respondent wanted a good health insurance plan for the employees and they did not need a union to get it, DeBedolla adamantly said Grimm said both things—''Rosa had told [Grimm] that we wanted insurance. And that's why he had the meeting. He said that they had been planning to give us insurance as of six months prior, but he didn't think that we needed it so quickly until Rosa spoke to him the day before. But since we had sent the cards signed by various people to the union, with the understanding that if that hadn't occurred he wouldn't have given it to us. . . . He was referring to that if we hadn't . . . gone into the union . . . he could give us the insurance . . . he couldn't do it unless they withdrew.''

Employee Francisco Villalobos testified that he was present, in August or September, when Grimm spoke to a small group of 10 employees. According to the witness, Grimm requested questions from employees, ''but the one I remember most importantly was about the health insurance. . . . He said he was planning to give us medical insurance but at that time he couldn't do it because the persons form the union were there. And he had to wait to see what would happen with these people, if it was going to happen or not.''

With regard to what he said at the meetings on the subject of health insurance, during direct examination, Rod Grimm said his general response, as he had not as yet heard from his attorneys, was ''that we had been looking into it for some time but at this time we were uncertain whether or not we could or would implement a health insurance plan.'' Grimm specifically denied saying there was no health insurance because of the Union. During cross-examination, Grimm stated that his response to the employees as to health insurance was that it posed ''a dilemma'' as ''on one hand we were obligated to . . . conduct business as if the petition did not exist . . . and on the other hand, it could be interpreted [as] doing something to influence the outcome of the election.'' He added that, while he may not have been always as detailed, ''I tried to say that we were uncertain at this time what we could do because . . . it involved considerable research and we . . . had been working to implement a plan, but I could not say . . . whether or not we would be putting a plan into effect.'' Further, while Grimm denied linking his statement to union considerations, Respondent failed to call, as a witness, the interpreter, Rosa Rivera to corroborate Grimm. Finally, the record establishes that Respondent did, in fact, implement health insurance for its voting unit employees in November 1991.

Paragraphs 9(b) and (c) relate to statements allegedly made by a labor relations consultant hired by Respondent, Judy Castillo, in September and December 1991. The record establishes that Castillo and two other Spanish-speaking labor relations consultants, Ed Colon and Patrick Lopez, were retained by Respondent to work during the entire union campaign at Respondent's facilities and actually were present at the Arvin and Lamont plants from mid-September through mid-December 1991 and during the 3-week period preceding the May 8, 1992 election. According to Castillo, she and Colon worked at the Arvin plant, and Lopez was assigned to the Lamont plant. As to the number of employee meetings, which she conducted, Castillo stated that she saw each employee approximately four or five times and that she saw the employees individually, sometimes in small groups of no more than 10, and in large groups of up to 55 employees. Employee Calixto Orellana testified that he attended a September employee meeting, conducted by a woman whose name he can not recall, in the line 3 cafeteria. Approximately 45 employees, including Francisco Villalobos, were present, and the meeting began with the woman showing a video, concerning drug trafficking and the Union, to the assembled employees and saying that the Union's leaders were drug traffickers and used employees' dues to finance their operations. At this point, according to Orellana, he spoke up, saying drug moneys had supported the contras in Nicaragua. According to Orellana, later in the meeting the woman stated that ''it was possible that if we accepted the union we would lose benefits in the Company. . . . I asked her what benefits were we going to lose. We don't have any. . . . She answered and said the benefit we could lose was our job.''[19] Corroborating Orellana, Francisco Villalobos testified that he attended a meeting, at which 40 or 50 employees were present, at the plant, approximately 1 month after the aforementioned Rod Grimm meeting. ''Miss Judy'' conducted the meeting and said ''she was going to talk to us about the unions. . . . She started saying that we should have patience with the boss and wait and not sign any cards. . . . Miss Judy said that if we . . . made a commitment with the union that we could lose our benefits at the company. And then [a] co-worker said what benefits could [we] lose if we didn't have any. And [Castillo] answered that the benefit we could lose was the benefit of our job.'' According to Villalobos, Castillo continued, saying ''that the boss would remedy the

[19] Judy Castillo specifically recalled a meeting at which, as it began, Orellana raised his hand and, after being recognized, said that President Reagan was a criminal, running drugs from Columbia, and the country needed a leader like Fidel Castro. According to Castillo, she interrupted and told Orellana to stop. Thereupon, he placed his head down on a table for the remainder of the meeting. Sanitation supervisor, Ruben Oliva, who stated that he was at this meeting, corroborated Castillo that Orellana interrupted Castillo and made some comments about Reagan and Bush selling drugs but did not corroborate her with regard to Orellana putting his head down for the remainder of the meeting. Also, corroborating Castillo, was employee Ricardo Torres Guillero, who stated that ''Calixto started talking about the Government. President Reagan sold arms to Noriega. He was told we weren't here to discuss that subject; we're here to talk about the union. That's all.'' Guillero added that Orellana then laid his head down of the table for ''two or three minutes.''

problems that were there. . . . She said the union . . . would bring many people into the company and give only eight hours of work to the workers.''[20]

Sandra Teran, who worked as a sorter at the Arvin plant until leaving as a result of illness in January 1992, testified that, in September, she attended a meeting, attended by approximately 25 employees, in the line 3 cafeteria. Judy Castillo conducted the meeting and spoke about the Union, calling the leaders ''liars, finks, and other things. Also, that it wouldn't be convenient for the owner [if] the union came in there. And that as the union came in, they were going to reduce our hours and that Saturdays and Sundays would not be work. . . . She also said that . . . if we voted for the union . . . the company would go on strike. And the three days we would be on strike we could be replaced permanently. That they could only call us back if they wanted to.'' During cross-examination, when confronted with her pretrial affidavit, in which she mentioned nothing about Castillo, at this meeting, saying anything about losing benefits, jobs, or hours, Teran insisted that her trial testimony was correct and that ''[Castillo] said that hours were going to be reduced. And that we could lose our jobs if the union won . . . because the boss wasn't going to want strangers to come into the Company.'' However, having just declared the accuracy of her testimony, Teran then somehow reversed herself and affirmed the truth of her affidavit version of the employee meeting.

Maria DeBedolla testified with regard to a Judy Castillo meeting, at which she was present, one afternoon in December at the Arvin plant. Approximately 25 employees were in attendance, and Castillo conducted the meeting along with Ed Colon. According to DeBedolla, Castillo said that ''if the people voted . . . for the union it was going to be declaring ourselves on strike . . . that if we voted for the union . . . the company was planning on making changes . . . that we were going to get less hours. That they were going to make three shifts instead of two. Eight hours each shift. That if the union won we would go on strike. That if in seventy-two hours we didn't show up at work they were going to replace us. . . . [T]hat they were going to take away overtime . . . on Saturday.''[21]

Marcella Lopez Ruiz testified as to an employee meeting, conducted by Castillo, which she attended one morning in September 1991. Approximately 35 to 45 employees were present, and Castillo, speaking in Spanish, said she was representing Respondent and ''then she [said] . . . that the union only wanted our money, that every time a union came into a company, the company would go bankrupt, and the worst thing was that they would put us on strike. That a strike for many of us would mean leaving work. . . . [T]hat we wouldn't have a right to get unemployment . . . because it was something we were doing from our own free will.'' Castillo added that, if anyone was ''working out'' amnesty, a strike would count against his record. Asked if Judy said anything about their work hours, Ruiz recalled, ''she said that if the union came in, we might work less hours, that with the union we might have a higher salary and the company could not continue to give 10 to 10-1/2 hours with a higher salary.'' Finally, Victoria Ramirez testified that she attended an employee meeting, conducted by Judy Castillo, one morning in December. The meeting occurred in the line 3 cafeteria, and between 20 and 30 employees were present. According to Ramirez, Castillo began by asking the assembled employees to wear their company T-shirts on the day of the election and then said ''that if the union won the election more people would be brought in. It would add another shift and reduce our hours because what the union wants is its dues.'' She turned to the subject of overtime and said ''that if the union won it would reduce our hours, no more overtime, less than eight hours and that was inconvenient for us.'' During redirect examination, Ramirez recalled that Castillo also said that, if the Union won the election, ''it would close down, the company would close down.'' Notwithstanding her testimony in this regard, Ramirez did not mention the latter alleged Castillo statement in her pretrial affidavit.

Judy Castillo testified that the consultants' main tool was the Board's published ''basic guide'' to employee rights under the Act, that the consultants also used Department of Labor LM-2 reports, union constitutions, video tapes, and newspaper articles, that copies of the ''basic guide were distributed to employees, and that a total of five videos were shown to the employees. She added that ''the large meetings . . . were always structured. For the informal meetings with groups of 10 . . . it was basically what they wanted to talk about.'' While denying that she ever threatened employees with reduced hours or overtime if they voted in the Union, Castillo stated that those subjects were discussed. ''Basically we were talking about contract negotiations. We told them that anything is possible in contract negotiations. You never know which way its going to go. The union being a business, it's to their interest to have more employees. They may ask to limit the employees' work to eight hours a day.'' Also, she would explain to the employees that having more employees was to the Union's benefit as it would want to collect more dues. Further, Castillo denied threatening employees with loss of jobs if they voted in the Union or that, after a strike, Respondent would retaliate by delaying the recall of strikers, but she admittedly did discuss strikes, telling the employees ''that there would be a possibility that there would be a strike. And . . . I would read . . . from the guide . . . exactly what it says about strikes.'' Elaborating, Castillo testified, ''we told [the employees] that they could be permanently replaced and that if they wanted to return from a strike, they'd have to . . . come in unconditionally.'' Further, Castillo denied telling employees that Respondent would go bankrupt or would close down if they selected the Union as their bargaining representative or that they could lose any benefits if the Union was voted in. In the latter regard, according to Castillo, she did explain the bargaining process—''it's a give and take. You don't know if you're going to win in that process, if you're going to lose . . . or if you're going to remain the same.'' During cross-examination, Castillo said that, after she read the strike passages from the Board's ''basic guide,'' employees would ask questions to which she would respond—''we had to differentiate between the two different kinds of strikes. Theirs would be an economic strike.'' Finally when asked if she had ever heard

[20] At the time, according to Villalobos, he worked a significant amount of overtime—up to 3 hours of overtime a day and 6 days a week.

[21] The witness testified that, at the time of Castillo's remarks, Respondent operated two shifts at the Arvin plant, and employees worked 9 hours a day and on Saturdays.

of a union ever asking an employer to contractually limit employees to 8 hours of work, Castillo averred that her cousin had mentioned a union doing so ''many, many years ago.'' Ricardo Torres Guillero, who was called as a witness by Respondent, testified with regard to attending at least one of the Castillo meetings and, while stating that she did read from documents and distributed others, denied ever having seen a copy of the Board's ''basic guide.'' Further, asked what Castillo said would happen if employees engaged in a strike, Guillero responded that Judy said, ''if there was a strike, they would join the strike, that . . . [possibly] . . . they could lose their job.'' Asked how Castillo phrased this, the employee replied, ''If you went on strike, a company could replace you''; he could recall no further explanation and answered ''no'' when asked if she mentioned the need to make an unconditional offer to return.

Paragraph 9(g) concerns the allegedly unlawful acts and conduct of Soccoro Montes, who, the record establishes, is a supervisor of the night-shift employees at the Lamont plant and who, Respondent admitted, is a supervisor within the meaning of Section 2(11) of the Act. The work of the night-shift employees involves the grading and packing of carrots in cellophane bags and cartons.[22] Three former Lamont night-shift employees, two of whom quit their employment shortly after the May 8, 1992 election and one who was terminated 3 days after the election, testified with regard to Montes' allegedly unlawful acts. Fidel Garcia, who worked as a sorter before quitting his job, testified that, 1 night at approximately the end of March 1992, ''I was working, [Montes] came to where I was working. . . . She . . . spoke about that if I wasn't happy with the company. . . . She spoke to me about the union, what was it I was seeking with the union. I said that all of this was because of the injustices they were doing to the workers.'' Montes replied that the employees really wouldn't gain anything with a union and stated that, even if the Union triumphed in the election, the supervisors would continue to do what they believed was necessary. Thereupon, Garcia began complaining about the competency of the supervisors. Montes replied that Respondent had a school for lower level supervisors and asked how Garcia knew so much about human relations. Garcia replied that he had taken courses on the subject. Then, Montes mentioned that a foreman, named Sylvester, wasn't doing his job right and asked if Garcia wanted the job, saying ''that if I would stop my support for the union . . . she would be able to help me.'' Garcia refused her offer, telling Montes that he would never accept a job offer to take the place of someone else. During cross-examination, asked why Montes would have such a conversation with him, Garcia stated that he had been distributing union leaflets during his break periods and wore a union button. Montes testified that she knew Garcia as being from Guatemala and ''as a worker on the line'' and admitted having a conversation with him regarding a supervisory position while Garcia was ''on the line at work time.'' According to Montes, ''we were talking of his native country and mine and of the work. He commented that at one time he was a supervisor. . . . I told him in the past I needed a supervisor.'' Then, she mentioned he seemed to be an intelligent person and would have fit in well in a supervisory position. Montes denied mentioning the Union during their conversation.

Mario Guttieruz, who was fired by Respondent 3 days after the election, testified that he performed many jobs at the Lamont plant, including sorting and weighing bags and boxes and that, in March 1992, he was instructed to report to Montes' office. Guttieruz arrived at the office, closed the door, and observed that another women, whose name he did not know, was with Montes. Guttieruz recalled that it was a short ''interview'' and that Montes only asked ''for what we wanted a union'' and ''what is the union going to bring you.'' According to the witness, he replied that ''we were looking for someone who could represent us to avoid all the injustices that were occurring.'' Both women laughed at this, and Montes told Guttieruz to return to work. Guttieruz testified that, prior to the conversation, he would distribute union leaflets to coworkers during break periods and lunches and always wore a union button. While admitting knowing Guttieruz as ''another worker,'' Montes denied speaking to him about the Union prior to the election.

Salvador Pantoja, who worked at the Lamont plant as a carrot sorter and packer until he quit and was supervised by Montes, testified that, 1 night in February or March 1992, he was asked to report to Montes' office. He arrived, and she told him to close the door. Admitting that he had just spent 5 minutes in the bathroom, Montes began by asking why he took so long, and Pantoja replied that it wasn't too long. Then, ''she asked me what we were gaining in being with the union. I answered . . . that it was fight between all of us that were working . . . that wanted better treatment, better salaries. And not to treat their people so badly.'' Montes replied that, prior to the Union, everyone was happy and that, now, everyone was unhappy and no longer united. Pantoja asked if (he) had been paged to speak about the Union or about something else, and Montes replied that she could have him come to her office whenever she wanted. Then, she asked if he had put on his employment application that he was a ''dependent'' of the Union. Pantoja denied it, saying he had only distributed literature for the Union because of Respondent's behavior. Montes then asked why he had failed to mention his membership in the Union, and Pantoja said the employment application was silent as to that. Then, Montes asked ''what are you seeking with the union that you can't find with the company,'' but Pantoja did not reply. Three weeks later, Pantoja testified, he was again paged to report to Montes' office. No one else was present when he arrived, and Montes began by saying he was a nice guy and a good friend to her and then asked ''why is it that whenever the union enters the company closes down.'' Pantoja replied that companies never close; they merely change names in order to avoid the Union. Montes replied that companies file for bankruptcy when unions come in and

[22] Specifically excluded from the voting unit by the Acting Regional Director were seasonal employees. Scrutiny of the representation hearing record discloses that, apparently, the only seasonal employees, who are employed by Respondent, comprise the approximately 250 night-shift employees at the Lamont plant. Respondent's general counsel, Jeffrey Green, testified that, each year, the employees, who work on the night shift at the Lamont plant, are hired in or about November and work until the following July or August. Socorro Montes testified that approximately 15 to 20 employees on her shift are regular, full-time employees and that all employees, who work at night at the Lamont facility, including the shipping employees, who are regular, full-time employees, share the same facilities and take lunches and breaks together.

said she really had a question—what would happen to her and the other supervisors if the Union won the election. Pantoja said all would remain working, but Montes asked if things would ever be the same, and Pantoja said, no. Pantoja recounted a third conversation with Montes in her office 2 weeks before the election. With no one else present and the door closed, Montes began, asking ''What were we looking for, what was it that we wanted with the union that I was bothering the people about. . . . I answered to her that the people are working for necessities.'' Montes asked what he thought the Union could do, and Pantoja said he was fighting for his rights.[23] During cross-examination, Pantoja admitted that, in his pretrial affidavit, he had only mentioned two conversations with Montes prior to the election—one occurring 2 weeks before the election and the other 1 week later. Asked by me whether his testimony or his affidavit was correct, Pantoja claimed both versions of the events were accurate. Montes testified that, a month or two prior to the election, she spoke to Pantoja about visits to the bathroom—''I called him to come into the office because he was 15 minutes in the bathroom.'' Pantoja replied ''that if he had to stay 15 minutes in the bathroom, he would stay 15 minutes.'' She denied any mention of the Union during this conversation or at any time prior to the election with Pantoja.

Finally, although not alleged as an unfair labor practice in the third consolidated amended complaint, former employee, Sandra Teran, who worked at the Arvin plant, testified that, having left Respondent in January 1992 due to illness, she had a conversation with a ''female foreman,'' named Arelia Juarez,[24] in May or June 1992 in the line 3 cafeteria. According to Teran, ''I told her that I had just turned in an application. I told her that I wanted to go back. . . . And she said that maybe they would not give me my job back. And I said why? And she said because I had been with the union.''

### B. *Legal Analysis*

Initially, I consider Respondent's allegedly unlawful refusals to rehire Sergio Martinez, Luis Villa, Trinidad Duran, Pedro Zarco, Cayetano Suarez, Jorge Gonzalez, Herminio Romero, and Paulino Rojas. In this regard, counsel for the General Counsel contends that, on the Memorial Day holiday in May 1990, the above eight individuals, along with the other employees on the sanitation crew at the Arvin plant, engaged in a concerted work stoppage in order to protest Respondent's refusal to agree to pay each of them time and one-half or double time for working that day; that Respondent terminated and, thereafter, placed each individual on no rehire status based on the fact that he had engaged in the work stoppage; that at times Respondent was hiring employees over the last 6 months of 1991, each of the eight former employees reapplied for a job with Respondent; that the personnel clerks informed each he was not eligible for rehire based his participation in the 1990 Memorial Day strike; and that, accordingly, by refusing to rehire the alleged discriminatees, Respondent ''manifested a contemporary linkage between their prior protected activity and the current refusal[s] to hire,'' thereby, engaging in conduct violative of Section 8(a)(1) of the Act. Conceding the above-described factual background except for what the personnel clerks said to the alleged discriminatees as they applied for rehire, counsel for Respondent argues that, as the alleged Memorial Day 1990 concerted work stoppage occurred 13 months before any alleged discriminatee was denied rehire, ''the entire case of General Counsel . . . is based on the events of . . . the alleged discriminatees entirely outside the Section 10(b) [of the Act 6-month statute of limitations] period''; that, relying on the Supreme Court's decision in *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960), ''the Supreme Court and the Board will not find a violation within the Section 10(b) period if the graveman of the violation, or the evidence of motive, occurred outside the Section 10(b) period''; and that to find, as requested by counsel for the General Counsel, will violate the statutory purpose behind Section 10(b), which is ''intended to preclude the rehashing of such evidence and circumstances where the evidence of conduct within the Section 10(b) period was not in and of itself evidence [of] a violation of the Act.'' In addition, citing the Board's decisions in *Postal Service Marina Center*, 271 NLRB 397 (1984), and *Carter-Glogau Laboratories*, 280 NLRB 447 (1986), counsel asserts that the significant event herein was Respondent's termination of the alleged discriminatees for having engaged in the work stoppage, that the Act's statute-of-limitations time period began on that date in 1990, and that the alleged discriminatees were required to have filed unfair labor practice charges within 6 months of the date of their terminations rather than waiting ''until the consequences of the act [became] most painful''—the time each reapplied for a job. Contrary to counsel for Respondent, counsel for the General Counsel argues that the alleged unfair labor practices are separate and distinct unlawful acts within the 10(b) period and that the evidence of conduct, beyond the 6-month statute of limitations may be considered as background evidence to establish motivation.

Inasmuch as the testimony of the alleged discriminatees was uncontroverted, I shall credit their accounts of the events of the Memorial Day holiday in 1990; although also uncontroverted, as the testimony of alleged discriminatees, Zarco and Martinez, concerning ''Marta's'' asserted comment that the group had been discharged for engaging in a strike, was contradicted by the others, I can not, and do not, rely on said assertion. Further, the fact that, during the last 6 months of 1991, each of the alleged discriminatees went to Respondent's office and sought reemployment was likewise uncontroverted by Respondent; however, what was said by the female personnel clerks to the alleged discriminatees as they submitted their new employment applications is in dispute. In this regard, notwithstanding that Respondent then employed two personnel clerks, Maricella Castillo and Eva Jimenez, only one alleged discriminatee Suarez stated that he spoke to Castillo, and no less than six insisted that they spoke to the personnel clerk, named ''Marta,'' variously and contradictorily described as being short, thin, and wearing glasses, ''not too big or too short'' and blond haired, thin with black hair, and slightly overweight, and that this female clerk was not Maricella Castillo. Moreover, Luis Villa identi-

[23] Pantoja averred that he and Montes spoke as friends.

[24] According to Teran, Juarez was her supervisor on the green bean line and that, sometimes, Juarez assigned her work and assigned overtime. Contrary to Teran, Supervisor Corina Sierra described Juarez as a ''regular worker'' with no supervisory authority. The parties stipulated that her name appears on the election eligibility list.

fied a photograph of Eva Jimenez as Marta and testified that she was the personnel clerk with whom he spoke; however Jimenez denied being known by that name, and the record establishes that she was performing different work for Respondent as of October 18, the day, according to Sergio Martinez, he and Villa assertedly spoke to ''Marta.'' Given the foregoing, one may reasonably doubt the existence of the mysterious Marta and, as Castillo admitted possibly speaking to several of the alleged discriminatees when they reapplied for jobs, I believe that she was the individual to whom most of the alleged discriminatees must have spoken and so find.

Turning to what was said, while two of the alleged discriminatees, Villa and Gonzalez, testified, during direct examination, that Marta mentioned the employees' ''strike'' as the reason he was not eligible for rehire, each subsequently changed his testimony. Thus, during rebuttable testimony, Villa denied the personnel clerk used the word strike, stating her words were ''for the problems that had happened.'' Also, during his cross-examination, Gonzalez contradicted his prior testimony, saying what said was that he wouldn't be rehired because he had ''abandoned'' work. Given their internally contradictory testimony, I can not credit either Villa or Gonzalez as to his above-described direct examination assertion or Villa's rebuttal admission—notwithstanding its similarity to the recollection of other alleged discriminatees. Alleged discriminatee Suarez attributed a similar statement to Maricella—''We can't take you because you're one of the ones who did a strike.'' However, Castillo specifically denied ever telling any applicant that he was ineligible for rehire because he had engaged in a strike, and there is no credible evidence that such an explanation, for refusing to rehire, was offered to any of the other alleged discriminatees. Further, as Maricella's practice, before explaining to an applicant why he would not be rehired, was to examine the individual's personnel file and as the no rehire explanation, which appeared in Suarez' personnel file was identical to that which appeared in the files of all the alleged discriminatees, ''employee walked out of the job,'' I believe that it is likely that Castillo utilized or paraphrased that language and unlikely that she would have uttered the comment, attributed to her by Suarez, and so find. Four of the alleged discriminatees (Duran, Martinez, Zarco, and Romero) vaguely recalled that the personnel clerk said each was ineligible for rehire based on ''what had happened the year before,'' or because of ''problems'' they previously had. Given their contradictory descriptions of the mysterious ''Marta'' and the questionable existence of such a person and reiterating that it is most likely that Castillo would have repeated what was written in the personnel files as the reason for the no rehire status, I place no reliance on the recollections of the alleged discriminatees and credit the admission of Castillo that she informed each alleged discriminatee, who inquired, that he would not be rehired because he had ''walked out the year before.''

Based on the foregoing, I find that, on the 1990 Memorial Day holiday, the Arvin plant sanitation and maintenance department employees, including the alleged discriminatees, met and together decided to demand that Respondent compensate them at a time and a half or double time wage rate for working on a holiday and informed their supervisor that, unless Respondent acquiesced to their demand, they would cease work for the remainder of the day and that, as Respondent refused to comply, the aforementioned employees, as a group, subsequently did, in fact, leave work early and engage in a work stoppage for the remainder of the day. Further, I find that not only did Respondent terminate each individual, who participated in the work stoppage, but also classified each as being ineligible for rehire as having ''walked out of the job.'' Finally, I find that, during the last 6 months of 1991, at times when Respondent was hiring, each of the alleged discriminatees applied for reemployment and was denied such by Maricella Castillo, the personnel clerk,[25] who, on checking the no rehire rationale for each, repeated that information to the alleged discriminatees—they were ineligible for rehire because ''they had walked out'' the previous year, a refusal to rehire explanation commonly utilized by Respondent. While paragraph 7(b) of the third consolidated amended complaint alleges that said comment by Castillo was violative of Section 8(a)(1) of the Act, I believe that she merely repeated what was written in the personnel file of each alleged discriminatee to whom she spoke and that her language was far too vague to have any sort of coercive connotation. In these circumstances, I shall recommend dismissal of the above allegation.

In considering whether Respondent's refusal to rehire the alleged discriminatees[26] was violative of Section 8(a)(1) of the Act, it is necessary to utilize the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 453 U.S. 989 (1983),[27] which the Board has applied in cases involving refusals to hire. *Fluor Daniel, Inc.*, 311 NLRB 498 (1983). Accordingly, the initial inquiry must be whether the General Counsel has made a prima facie

[25] It is alleged that Maricella Castillo acted as Respondent's agent within the meaning of Sec. 2(13) of the Act. The record discloses that personnel clerks Castillo and Eva Jimenez were the only representatives of Respondent who met and spoke to employees during the hiring process; that each distributed and received employment applications, answered any questions with regard to the documents or the applicants' hiring status or opportunities; that the personnel clerks offered positions to new hires, explaining the job and wage rate; and that Castillo and Jimenez would give IRS forms to the employees and take I.D. pictures. Inasmuch as Respondent placed Castillo and Jimenez in positions in which each had the apparent authority to provide information and to answer questions relative to the hiring process, I find that each acted as Respondent's agent within the meaning of Sec. 2(13) of the Act. *Diehl Equipment Co.*, 297 NLRB 504 at fn. 2 (1989).

[26] Notwithstanding that he was not specifically advised that he would not be rehired or given any reason as to why no action apparently was taken on his employment application, I include Paulino Rojas in the class of alleged discriminatees. Thus, not only did he apply for a job within the 10(b) period, but also the identical ineligible for rehire rationale appears in his personnel file. Contrary to counsel for the General Counsel, while unnamed individuals, who are similarly situated to alleged discriminatees may properly be included in a ''class,'' the class herein consists of those employees, who participated in the Memorial Day protected concerted work stoppage and who applied for jobs within the 10(b) period, and not merely those who participated in the work stoppage. There is no record evidence that any employee, who participated in the work stoppage, other than the alleged discriminatees applied for rehire during the 10(b) period, and the ''class'' may not be expanded beyond the eight employees, who are named in the third consolidated amended complaint.

[27] *Blue Circle Cement Co.*, 311 NLRB 623 (1993).

showing sufficient to support an inference that the alleged discriminatees' protected concerted activities were a ''motivating factor'' in Respondent's refusal to offer rehire to any of them. In this regard, the General Counsel must establish that the alleged discriminatees engaged in protected concerted activities; that the employer had knowledge of such; and that the employer's acts were motivated by animus involving the conduct of the alleged discriminatees. *Blue Circle Cement*, supra. Herein, of course, all the evidence, necessary to support each aspect of the General Counsel's requisite prima facie showing, is enmeshed in the events of Memorial Day 1990, which occurred approximately 11 months prior to the commencement of the 10(b) statute of limitations period. Put another way, while the refusals to rehire occurred within the 6-month period preceding the filing of the unfair labor practice charge in Case 31–CA–19115, there is no evidence, beyond the ambiguous statement made to seven of the eight alleged discriminatees by Maricella Castillo, within the 10(b) period, on which to support a showing that the alleged discriminatees' protected concerted activities were a motivating factor in denying them reemployment. In these circumstances, as both counsel for the General Counsel and counsel for Respondent recognize, the existence of a prima facie violation of Section 8(a)(1) of the Act is dependent on whether one may consider evidence, regarding the alleged discriminatees' acts on the 1990 Memorial Day holiday and Respondent's reaction to said conduct, as bearing on and explaining the refusals to hire and Maricella Castillo's statements to the alleged discriminatees within the 10(b) period, and the Supreme Court's reasoning in *Bryan Mfg. Co*., supra, is crucial in this regard.

In *Bryan Mfg. Co*., 362 U.S. at 416–417, in ruling on the use of evidence relating to events ''transpiring'' beyond the 10(b) statute of limitations period, the Supreme Court distinguished between two different situations:

> The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose Section 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely ''evidentiary,'' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

Herein, inasmuch as the conduct of the alleged discriminatees themselves in engaging in a work stoppage on the 1990 Memorial Day holiday, and not Respondent's discharge of each participant, is the primary focus, it is clear that we are confronted with the first of the 10(b) evidentiary situations, and counsel for the General Counsel contends that evidence of the 1990 work stoppage may be utilized as ''background'' to shed light on the true nature of Respondent's conduct within the 10(b) period. However, in *Bryan Mfg. Co*., in considering the extent to which one may rely on pre-10(b) evidence to shed light on subsequent events, the Supreme Court, noted the existence of several Board decisions, which limited the use of such background evidence. Thus, the Court pointed to *News Printing Co*., 116 NLRB 210 (1956), in which the complaint alleged that the respondent violated Section 8(a)(1) and (3) of the Act by failing to grant wage increases to certain employees and, after finding that the General Counsel had offered no evidence within the 10(b) period establishing any of the required elements of proof, including that the charging parties engaged in union or other protected concerted activities or evidence that they were denied the wage increases because of such activities, and instead had relied on an earlier Board decision to supply the ''missing proof,'' the Board concluded that, while evidence predating the 10(b) period may be used as background, Section 10(b) ''precludes the Board from giving independent and controlling weight to such evidence.'' Id. at 212. While expressing no view on the ''problem'' raised by *News Printing* and similar cases, the Court did state ''that a finding of violation which is *inescapably grounded* in events predating the limitations period is directly at odds with the purposes of the Section 10(b) proviso.'' *Bryan Mfg. Co*., supra at 422 (emphasis added).

Based on the foregoing, I believe that Section 10(b) precludes use of the evidence of the events of Memorial Day 1990 to find violations of Section 8(a)(1) of the Act with regard to Respondent's refusals to hire the eight alleged discriminatees. Thus, in decisions subsequent to *Bryan Mfg. Co*., such as *Stafford Trucking*, 154 NLRB 1309 (1965), the Board has permitted the utilization of pre-10(b) evidence on such matters as motive and knowledge of union or protected concerted activities '' unless the General Counsel's case is inescapably grounded on evidence predating the 10(b) period.'' *Pennsylvania Electric Co*., 289 NLRB 1200, 1206 (1988); *Denzil S. Alkire*, 259 NLRB 1323, 1329 at fn. 4 (1982). In other words, if the General Counsel is able to point to evidence, establishing the necessary elements for the violation within the 10(b) period, evidence, predating the statute of limitations period, may be considered to shed light on the meaning of the former. With regard to the instant allegedly unlawful refusals to hire, the only evidence arguably establishing violations of Section 8(a)(1) of the Act, occurring within the 10(b) period, are the ambiguous statements attributed to Maricella Castillo. While counsel for the General Counsel characterizes her comments as admissions, they may only be deemed as such when reference is made to the events predating the 10(b) period; otherwise, her nebulous statements, as well as what is written on the inactive employee sheets, may refer to any number of employee actions. Contrary to counsel for the General Counsel, I believe the instant fact situation is remarkably similar to that with which the Board was confronted in *News Printing Co*., supra. Thus, there is no evidence, ''standing alone,'' within the 10(b) period sufficient to establish the necessary elements of prima facie violations of Section 8(a)(1) of the Act, and one must entirely rely on pre-10(b) evidence, the events of the 1990 Memorial Day holiday, to establish the ''missing proof'' of all the elements of the violation. In these circumstances, as the General Counsel's allegations are utterly and ''inescap-

ably grounded'' on evidence, predating the 10(b) period, I shall recommend dismissal of paragraph 7(c) of the third consolidated amended complaint.

Next, with regard to the unlawful union solicitation rule allegations of paragraph 6 of the third consolidated amended complaint, credibility considerations are of paramount importance. Initially, as to the incident involving employee Maria DeBedolla and Corina Sierra, the former, who is a current employee of Respondent, appeared to be a more honest and trustworthy witness, and, therefore, I shall credit her over Sierra. Accordingly, I find that, in or about August 1991, Sierra pulled DeBedolla away from her sorting line and warned her that, during ''working hours'' in the plant, she could not talk about the Union with her coworkers.[28] The Board has long held that such a union solicitation policy encompasses ''periods from the beginning to the end of workshifts, periods that include the employees' own time,'' such as meal times and break periods, as well as times ''when the employees have completed their shifts but are nevertheless still lawfully and properly on company premises pursuant to the work relationship,'' and, therefore, is presumptively invalid. *Norris/O'Bannon*, 307 NLRB 1236 at 1245 (1992); *Keco Industries*, 306 NLRB 15 at 19 (1992); *Our Way, Inc*., 268 NLRB 394, 394–395 (1983). Respondent presented no evidence of any management interest, justifying the existence of such a stringent restriction on employees' union activities, and I find the rule, as announced by Sierra, was violative of Section 8(a)(1) of the Act. *Norris/O'Bannon*, supra.

As to allegedly unlawful warning notice incident involving employee Marcella Lopez Ruiz, Ruiz, who remains employed by Respondent, impressed me with her candor and truthful manner while testifying. In contrast, Eddie Rosson, the Arvin plant production manager, appeared to be a most disingenuous witness, one utterly devoid of trustworthiness. The mendacity of his testimony is apparent from the contradictions between his version of events and that of a supposedly corroborative witness, Foreman Elano Cuevas. Thus, while the former asserted that General Counsel's Exhibit 4, the written warning, was not a written warning but rather some sort of record of a counseling session and denied instructing Cuevas to issue a written warning, Cuevas readily admitted the document was a warning notice and that Rosson directed him to issue a written warning, and, while Rosson disavowed any part in the drafting of the document, Cuevas stated that Rosson was present during, and participated in, the drafting of the warning notice. Further demonstrating the incredible nature of Rosson's assertion that the warning notice was not, in fact, a warning notice is the fact that the exhibit was produced by Respondent pursuant to a subpoena request for written reprimands. I place no credence in any aspect of Rosson's testimony herein. Moreover, as between Ruiz and Cuevas, the former appeared to be a more reliable witness and, therefore, her testimony shall be credited over that of her supervisor. Accordingly, I find that, on November 27, 1991, Ruiz was called into the supervisors' office by Cuevas, who, echoing fellow Supervisor Sierra, told Ruiz that she had been observed speaking to another women on the sorting line about the Union and that ''here it's prohibited to speak about the union during work hours.'' Cuevas announced that the above would constitute an oral warning; Eddie Rosson then entered the office and, after Cuevas informed him about him what had occurred, instructed the foreman to make the reprimand a written warning. Thereupon, Rosson turned to Ruiz and said that she could not speak to other employees about the Union during work hours or during break periods ''because it was during the time that the company was paying. Only during lunch or after I get off.'' Finally, after Rosson finished, the written warning notice, General Counsel's Exhibit 4, which states, in part, that Ruiz had been warned about ''get[ting] more signatures against the Company in regular work time, not on lunch time,'' was given to her.

Clearly, as was the conduct of Supervisor Sierra above, Cuevas' promulgation of a union solicitation policy, which emphasized that employees were prohibited from engaging in union activities at the plant during ''working hours,'' is overbroad, with said term connoting a period from the beginning to the end of the workshift, a period including the employees' own time, such as breaks or lunches, and presumptively invalid and, as no justification for such a policy was offered, violative of Section 8(a)(1) of the Act. *Norris/O'Bannon*, supra; *Our Way*, supra. Furthermore, when Production Manager Rosson informed Ruiz that she could not speak about the Union with fellow employees during work time and break periods as ''the company was paying,'' he likewise enunciated an overly broad union solicitation policy, one which would prohibit employees from engaging in union activities on their own time, which is presumptively invalid and, as Respondent offered no justification, violative of Section 8(a)(1) of the Act. *Filene's Basement Store*, 299 NLRB 183, 210 (1990); *Cannon Industries*, 291 NLRB 632, 634 (1988). Finally, inasmuch as its wording implies that the warning against speaking to fellow employees about the Union ''in regular work time'' encompassed break periods, it seems certain that the November 27 disciplinary notice to employee Ruiz pertained to the facially overly broad no solicitation policy, established by Eddie Rosson. Therefore, she was disciplined for having violated an unlawful union solicitation policy, and an employer violates Section 8(a)(1) and (3) of the Act by disciplining an employee in such circumstances. *Mast Advertising*, 304 NLRB 819 (1991); *Jennings & Webb, Inc*., 288 NLRB 682 (1988).

I turn next to the third consolidated amended complaint allegation that Respondent's refusal to retain employee Manuel Pelayo in his former position as a forklift driver, on his release from jail in early December 1991, was violative of Section 8(a)(1) and (3) of the Act and note that, as with the allegedly unlawful refusal to rehire allegations discussed above, adherence to the *Wright Line*, supra, analytical framework is required. Thus, as above, the initial inquiry must concern whether the General Counsel has made a prima facie showing sufficient to support the inference that Pelayo's activities in support of the Union were a ''motivating factor'' for Respondent's refusal to retain him, and the General Counsel's burden, in this regard, was to establish that Pelayo engaged in activities in support of the Union, that Respondent was aware of his support for the Union and was motivated by animus, based on union considerations, in refusing

[28] While DeBedolla also stated that the supervisor asked if she supported the Union, such is not alleged as unlawful in the third consolidated amended complaint and counsel for the General Counsel did not request that I make any finding as to the interrogation. Therefore, I shall make no finding as to the legality of the question.

to retain Pelayo, and that the refusal to retain Pelayo had the effect of encouraging or discouraging membership in the Union. *WMUR–TV*, 253 NLRB 697, 703 (1980). If the General Counsel is successful, the burden would then shift to Respondent to demonstrate that the same action would have taken place notwithstanding the protected conduct. Initially, the credibility of the witnesses is, of course, crucial to determining if the General Counsel established a prima facie violation of the Act and, in this regard, Manuel Pelayo impressed me as being an honest and forthright witness, who appeared to be testifying honestly and to the best of his recollection. In contrast, the shipping department supervisor, Mathias Hernandez, did not seem to be testifying in a frank or straightforward manner, and, as he was contradicted by Valerie Rew and Michael Skaggs, I believe he dissembled in denying that he gave Pelayo permission to take a leave of absence in order to serve a jail sentence. As between Pelayo and Hernandez, I shall rely on the testimony of Pelayo. Further, Miguel Garcia and Fernando Romero, both of whom testified on behalf of the General Counsel, were impressive and candid witnesses. On the other hand, Supervisor Jose Diaz appeared to be testifying in a manner calculated to buttress Respondent's defense and, as between the two employees and Diaz, I shall credit the far more reliable respective testimony of Garcia and Romero.

Based on the foregoing credibility resolutions, and the record as a whole, I find that, during the preelection period in the fall of 1991, Manuel Pelayo was more vocal than others as a proponent of representation by the Union and that Hernandez, as he admitted, was aware of Pelayo's prounion sympathies. Further, I believe that Pelayo, who must have known that he probably would be required to serve no more than 18 days of his 27-day jail sentence for driving while intoxicated, did, in fact, speak to Hernandez and request an 18-day leave of absence in order to serve his jail term; that, giving credence to Skaggs and Rew, both of whom understood from Hernandez that he had granted Pelayo's request, Hernandez gave permission to Pelayo to take a leave of absence for the stated purpose; and that, at all times during the next three weeks, Mathias Hernandez knew Pelayo was an inmate at the local jail.[29] Moreover, there is ample record evidence to support the conclusion that, as a result of his support for the Union and fearful of the effect of such on the upcoming election, Respondent seized on Pelayo's leave of absence to replace him with another forklift operator and to refuse to retain Pelayo in his forklift driver position on the conclusion of his leave of absence and release from jail. Thus, I have specifically credited the testimony of Miguel Garcia that, in response to a question regarding Pelayo's job when he was released from jail, Jose Diaz said ''that Mathias had told him . . . they weren't going to give him work because he was talking about the union too much'' and that of Fernando Romero, who recalled Diaz saying that ''Mathias Hernandez says he's not going to come back because he talks about the union too much.'' Besides constituting direct evidence of animus, Diaz' statements were themselves patently violative of Section 8(a)(1) of the Act. Moreover, as Hernandez' stated reason for replacing and not retaining Pelayo—that Pelayo had not been granted a leave of absence; that Pelayo had failed to report for work the following week; that Hernandez could not locate Pelayo in jail and did not know where he was; and that, consequently, Hernandez was forced to replace Pelayo—is untrue, the inference is warranted that Respondent was concealing the real reason for failing to retain Pelayo on the conclusion of his leave of absence—his support for the Union. *Fluor Daniel*, supra. In these circumstances, there can be no doubt that the General Counsel has established a prima facie violation of Section 8(a)(1) and (3) of the Act with regard to Respondent's failure to return Pelayo to his job on the completion of his jail sentence.

Besides condemning the credibility of the witnesses, who testified on behalf of the General Counsel, counsel for Respondent offered two main arguments against the existence of unlawful animus with regard to Pelayo. The first is the lack of any other record evidence involving unlawful discrimination against any other employee. However, I have previously concluded that Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act with regard to the disciplinary warning notice, given to employee Marcella Lopez Ruiz. Moreover, the fact that Respondent may have engaged in no other unlawful discriminatory conduct, during the campaign, is not of itself exculpatory. Put another way, the fact that Respondent engaged in no other like discrimination does not mean Respondent could not have engaged in such action against Pelayo. The second, and perhaps main, argument concerns Respondent's conduct after Pelayo complained to Valerie Rew. While it is true that Pelayo was quickly offered employment elsewhere with Respondent and while such may negate any inference of unlawful animus, other explanations for her conduct are equally tenable. Thus, it may be postulated that, recognizing Respondent's exposure in the midst of a preelection campaign period, acted to limit Respondent's legal liability. It may just as feasibly be asserted that Rew was unaware of the true nature of Hernandez' motivation and acted responsibly and in good faith in giving Pelayo employment elsewhere with Respondent. In these circumstances, I do not believe it can be said that Rew's conduct negates the real evidence of unlawful animus with regard to Pelayo. Accordingly, as I believe that Respondent's asserted defense for its conduct was in the nature of a sham, utilization of the ''burden shifting'' analysis of *Wright Line* is unnecessary, and I find that Respondent's failure to retain Manuel Pelayo in his forklift driver position, after his release from jail, was violative of Section 8(a)(1) and (3) of the Act.

Turning now to paragraph 9 of the third consolidated amended complaint, I consider the various instances of interrogations and statements allegedly violative of Section 8(a)(1) of the Act. Initially, as to the August 1991 statements attributed to a labor relations consultant, apparently identified as Jose Agraz, I note that the testimony of employees Calixto Orellana, Francisco Villa Lobos, and Victoria Ramirez was uncontroverted and, as each appeared to be testifying in a frank and candid manner, I shall credit their respective testimony. Accordingly, I find that, in a series of meetings at the Arvin plant, at the approximate start of the Union's organizing campaign, Agraz asked the assembled employees to explain their problems with Respondent and said that he would then ''relate them to the . . . boss and he would try to resolve [them].'' The Board has long held that, when, during the course of a union's organizing campaign, an employer

[29] I do not credit Jose Diaz' assertion that he was unable to locate Pelayo at the Lamont jail.

asks employees for their complaints concerning their working conditions, it, thereby, impliedly promises to make changes. *Great Plains Coca-Cola Bottling Co*., 311 NLRB 509 at 513 (1993); *Columbus Mills*, 303 NLRB 225, 227 (1991); *Astro Printing Services*, 300 NLRB 1028, 1034 (1990). Here, of course, the promise to correct the problems was direct, and the aforementioned conduct must be found to have interfered with the employees' Section 7 rights in violation of Section 8(a)(1) of the Act.

The next allegedly unlawful statements are the comments, attributed to Rod Grimm, concerning the postponement of employee health insurance benefits. Two employees, Maria DeBedolla and Francisco Villalobos, testified in this regard, and each not only corroborated the other but also was an honest and straightforward witness. While Rod Grimm also appeared to be testifying candidly, I note that he utilized a Spanish-speaking individual, Rosa Rivera, who is apparently a supervisor,[30] to translate his remarks into Spanish and that Respondent did not call Rivera as a witness. Accordingly, I draw the inference that Rivera would have not have corroborated Grimm and, in said circumstances, shall credit DeBedolla and Villa Lobos as to what Grimm said. Accordingly, I find that, in a series of meetings with employees during September 1991, Rod Grimm told them that Respondent had been planning to institute a health insurance plan for the employees ''but at that time he couldn't because the persons from the union were there.'' By blaming the Union and union activity for Respondent's decision to postpone the implementation of a health insurance program, Rod Grimm ''impaired'' the Section 7 of the Act rights of Respondent's employees to support a union and to engage in union activity and thereby engaged in conduct violative of Section 8(a)(1) of the Act. *Fontaine Body & Hoist Co*., 302 NLRB 863, 870 (1991); *Triec, Inc*., 300 NLRB 743, 749 (1990).[31]

As to the allegedly unlawful statements of Judy Castillo, there is no dispute that, during the preelection period in the fall of 1991, she conducted numerous meetings with the Arvin plant employees. Initially, with regard to the September meeting, about which Calixto Orellana and Francisco Villalobos testified, the testimonial demeanor of each was that of a candid witness, testifying to the best of his recollection. Moreover, they corroborated each other as to their recollection of what Castillo said at that meeting. In contrast, as I viewed her, Castillo seemed to be a most disingenuous witness. On this point, the two supposed corroborative witnesses did not corroborate her assertion that, after making his political comment, Orellana placed his head on a lunch table for the remainder of the meeting and failed to deny the comments, attributed to Castillo by Orellana and Villalobos. In these circumstances, crediting the reliable testimony of the two employees, I find that, during this September meeting, Castillo told the assembled employees that, if they ''accepted'' the Union, they could lose benefits. At that point, Orellana interjected, asking what benefits were they going to lose as they did not have any, and Castillo replied ''the benefit we could lose was our job.'' According to Villalobos, who I specifically credit on this point, Castillo added that the boss would remedy any problems at the plant by bringing in enough workers to ensure only 8 hours of work each day for the employees. There can be no question that Castillo's first comment constituted nothing less than a threat of job loss, and, as such, was blatantly coercive and violative of Section 8(a)(1) of the Act. *Great Plains Coca Cola*, supra at 512; *Metalite Corp*., 308 NLRB 266 at 274 (1992); *Triec, Inc*., supra at 748. Further, as employees, including Villalobos, were accustomed to working several hours of overtime a week, Castillo's second comment clearly constituted a threat of reduced work hours and, as such, was clearly coercive and violative of Section 8(a)(1) of the Act. *Heartland of Lansing Nursing Home*, 307 NLRB 152 at 158 (1992); *Uniontown Hospital Assn*., 277 NLRB 1298, 1299 (1985).

Three other employees (Maria DeBedolla, Marcella Lopez Ruiz, and Victoria Ramirez) testified concerning allegedly coercive comments by Judy Castillo at employee meetings at the Arvin facility. In contrast to the mendacious testimonial demeanor of the latter, each of the three employees appeared to have been a frank and sincere witness, and each shall be credited herein as to what she recalled.[32] Echoing the testimony of Francisco Villalobos, most of the labor relations consultant's allegedly unlawful threats concerned loss of hours or overtime. Thus, DeBedolla recalled Castillo threatening ''that if we voted for the union . . . the company as planning on making changes . . . that we were going to get less hours. That they were going to make three shifts instead of two. Eight hours each shift.'' Likewise, according to Lopez Ruiz and Ramirez, Castillo warned ''that if the union came in, we might work less hours, that with the union we might have a higher salary and the company could not continue to give 10 to 10-1/2 hours with a higher salary'' and ''that if the union won [the company] would reduce our hours, no more overtime, less than eight hours and that was inconvenient for us.'' As stated above, overtime and an extra day of work each week were, and remain, important conditions of employment for Respondent's employees, and I believe that Castillo's blatant threats, that these would be affected by employees' support for a labor organization, clearly were calculated to have a coercive and destructive effect on the employees' Section 7 rights and, therefore, I find them violative of Section 8(a)(1) of the Act. *Heartland of Lansing Nursing Home*, supra; *Uniontown Hospital Assn*., supra.[33]

[30] I base this on the facts that, according to Grimm, a supervisor informed him that employees and that, according to DeBedolla, Grimm told the employees that Rosa Rivera, the interpreter, had informed him that employees wanted health insurance.

[31] In concluding that Grimm's comments to employees were violative of the Act, I have considered whether such were cured by Respondent's implementation of a health insurance plan 2 months later. In my view, such, in no way, vitiated Respondent's prior, deliberate interference with its employees' Sec. 7 rights. See *Passavant Area Hospital*, 237 NLRB 138 (1978).

[32] One other witness, Sandra Teran, testified regarding the allegedly unlawful statements of Judy Castillo. Notwithstanding that her testimony was similar to that of other witnesses, I found much of what she recalled contradicted by her pretrial affidavit and believe she exhibited a bias against Respondent for refusing to reemploy her after she voluntarily left due to illness. Accordingly, I found her to be an unreliable witness and do not credit her testimony. Accordingly, I shall recommend dismissal of par. 9(b)(iii) of the third consolidated amended complaint, which was based on Teran's unreliable testimony. Likewise, I shall not credit her testimony regarding an alleged conversation with an individual named Arelia Juarez and make no finding as to it.

[33] Several aspects of the testimony of DeBedolla, Lopez Ruiz, and Ramirez establish that Castillo may have made other statements vio-

Finally, with regard to the two third consolidated amended complaint allegations concerning Soccoro Montes, three separate incidents are involved. As to the first, Fidel Garcia impressed me with his honest and candid testimonial demeanor and was a far more forthright witness than Soccoro Montes, whose recollection of the precipitating incident seemed strained. Accordingly, I credit Garcia and find that, in March 1992, Montes approached Garcia, who was an open supporter of the Union, at his work station, pulled him aside and asked if he was happy working for Respondent and what he was seeking from the Union. As they spoke, Garcia complained about the competency of Respondent's supervisors, and Montes mentioned that Respondent had a training school for lower-level supervisors and asked how Garcia knew so much about human relations. Garcia said he had taken courses in the subject, and Montes responded that another foreman was not doing his job, asked if Garcia wanted the job, and said ''that if I would stop my support for the union . . . she would be able to help me.'' Notwithstanding that Garcia declined Montes' offer, the offer of a promotion tied to an employee's commitment to forgo support for a union is patently coercive, destructive of employees' Section 7 rights, and violative of Section 8(a)(1) of the Act. *Great Plains Coca Cola Bottling Co*., supra at 517.

Mario Guttieruz testified with regard to the second incident, involving Montes. While he had been terminated by Respondent shortly after the election and I recognize the possibility of bias, while testifying, Guttieruz' demeanor was that of a candid and straightforward witness, and I shall credit his detailed recollection of the incident over Montes' bare denial of unlawful conduct. Accordingly, I find that, in March 1992, Guttieruz, who was an open supporter of the Union, was called from his work station and instructed to report to Montes' office. He did so, closed the door, and observed another women in the office with Montes. The latter began the conversation, asking ''for what we wanted a union'' and ''what is the union going to bring you.'' When Guttieruz responded that the employees wanted representation because of the many ''injustices,'' both women laughed; Montes then told the employee to return to work. Having considered all the circumstances surrounding Montes' questioning of Guttieruz, as the Board directed in *Rossmore House*, 269 NLRB 1176, 1177 (1984), I note that the interrogation occurred in the supervisor's office after Guttieruz was called from his work station; that the door to the office was closed; that the intent of Montes clearly was to interrogate the employee with no pretext of casual conversation; that Montes had no valid purpose for her conduct; and that the supervisor's questioning was in the presence of a stranger. Notwithstanding Guttieruz' open support for the Union, I find that, in the above circumstances, the interrogation of Guttieruz, by Montes, coercively interfered with and restrained the former in the exercise of his Section 7 rights and was violative of Section 8(a)(1) of the Act. *Heartland of Lansing Nursing Home*, supra at 155.

The third instance of allegedly unlawful conduct, involving Soccoro Montes, consists of conversations between the supervisor and Salvador Pantoja, who testified in a truthful manner and appeared to be a far more impressive witness than did Montes. Relying on the account of the former, I find that, one night in February or March 1992, after having spent more time in the bathroom than Montes felt necessary, Pantoja was summoned to Montes' office, and the supervisor asked what had taken so long. Pantoja denied that his restroom stay exceeded the norm, and Montes thereupon ''asked me what we were gaining in being with the union.'' Then, after some more conversation about the Union, Montes accused Pantoja of being a ''dependent'' of the Union and asked him ''what are seeking with the union that you can't find with the company?'' Then, 2 weeks before the election, Pantoja was again paged to Montes' office and, with the door closed, Montes asked ''what were we looking for, what was it that we wanted with the union that I was bothering the people about.'' Pantoja replied that the employees were working for their ''necessities,'' and Montes asked what he thought the Union could do. Again, utilizing the approach of the Board, in *Rossmore House*, supra, I find that neither of these conversations were casual ones and that Montes' purpose was to interrogate Pantoja about his own union sympathies and those of his fellow employees. While the two may have been friends, the coercive character of the conversations is revealed by Montes accusation that Pantoja was a dependent of the Union. In these circumstances, I believe that the interrogations of Pantoja interfered with his Section 7 rights and were violative of Section 8(a)(1) of the Act.

### V. THE OBJECTIONS TO THE CONDUCT OF THE ELECTION

In view of Respondent's foregoing unfair labor practices including refusing to retain Manuel Pelayo in his position as a forklift driver because of his support for the Union, announcing an unlawfully broad union solicitation policy and disciplining Marcella Lopez Ruiz, with a written warning, for allegedly violating said unlawful policy, and interfering with employees' Section 7 rights by placing the onus on the Union for the postponement of an employee health insurance plan, threatening employees with loss of jobs if they selected the Union as their bargaining representative, threatening employees with loss of hours and overtime if they selected the Union as their bargaining representative, informing employees that another employee would not be retained because of his support for the Union, promising employees that they will be promoted to supervisory positions if they forgo their support for the Union, and interrogating employees as to their union sympathies and those of their fellow employees,[34]

lative of the Act. For example, according to DeBedolla and Lopez Ruiz, Castillo implied that, if the workers voted for the Union, a strike would be the immediate result. Moreover, according to Lopez Ruiz, Castillo obliquely warned that Respondent would become bankrupt if the employees voted for the Union, and Ramirez recalled Castillo threatening that the Company would close down if the employees voted for the Union. None of the foregoing was alleged as unlawful in the third consolidated amended complaint, and at no point during the trial or in her posthearing brief did counsel for the General Counsel seek that I find the foregoing unlawful. In these circumstances, I shall make no findings as to the legality of such statements.

[34] With regard to the conduct of Montes, Respondent argues that, as the employees, whom she supervised, were seasonal employees and, thus, excluded from the bargaining unit, whatever conduct may have been directed toward them may not be deemed objectionable. Whatever the validity of such an argument, I note that the Arvin night-shift employees had regular contacts with bargaining unit em-

*Continued*

and the fact that the conduct, attributed to Rod Grimm and Judy Castillo was communicated to groups of employees, I believe that Respondent created an atmosphere in which a fair election was impossible[35] and, in such circumstances, do not view the election as representing the free choice of the employees. Accordingly, inasmuch as the Union's objections reflect the found unfair labor practices, I shall recommend that the objections be sustained, that the election be set aside, and that the representation case be remanded to the Regional Director for the purpose of conducting a second election.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 87 and Local 78-B are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act by, on or about December 4, 1991, because of his support for the Union, refusing to retain Manuel Pelayo in his position as a forklift driver at its Lamont facility after the conclusion of his leave of absence.

4. Respondent engaged in conduct violative of Section 8(a)(1) of the Act by, in or about August and on November 27, 1991, announcing, and maintaining in effect, an overly broad union solicitation policy, which prohibited employees from engaging in union solicitation on their own nonworking time.

5. Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act by, on or about November 27, 1991, issuing a written warning notice to employee Marcella Lopez Ruiz for having assertedly violated its aforementioned overly broad union solicitation policy.

6. Respondent engaged in conduct violative of Section 8(a)(1) of the Act by, in or about August 1991, soliciting grievances and complaints from employees with the promise to make changes in order to discourage employees' union activity.

7. Respondent engaged in conduct violative of Section 8(a)(1) of the Act by, in or about September 1991, informing employees that, due to the presence of the Union, it would have to postpone the implementation of an employee health insurance plan.

8. Respondent engaged in conduct violative of Section 8(a)(1) of the Act by, in September and December 1991, threatening employees with loss of jobs if they voted in favor of the Union in a pending representation election.

9. Respondent engaged in conduct violative of Section 8(a)(1) of the Act by, in September and December 1991, threatening employees with loss of hours and overtime if they voted in favor of the Union in a pending representation election.

10. Respondent engaged in conduct violative of Section 8(a)(1) of the Act by informing employees that another employee would not be retained because of his support for the Union.

11. Respondent engaged in conduct violative of Section 8(a)(1) of the Act by, in or about March 1992, promising to an employee he would be promoted to a supervisory position if he would agree to forgo any further support for the Union.

12. Respondent engaged in conduct violative of Section 8(a)(1) of the Act by, in or about March and May 1991, coercively interrogating employees as to their union sympathies and the union sympathies of their fellow employees.

13. The aforementioned unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

14. Unless specifically found above, Respondent engaged in no other unfair labor practices.

## REMEDY

Having found that Respondent engaged in serious unfair labor practices violative of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist from engaging in such conduct in the future and, further, that Respondent be ordered to take certain affirmative action to effectuate the policies of the Act. As to Respondent's unlawful refusal to retain Manuel Pelayo in his position as a forklift driver at the Lamont plant after the conclusion of his leave of absence, during which he was incarcerated in a local jail, the standard Board remedy should apply.[36] Thus, Respondent shall be ordered to offer Pelayo immediate and full reinstatement to his forklift driver position at the Lamont plant or, if that position no longer exists, to a substantially equivalent one, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of pay he may have suffered, because Respondent unlawfully refused to retain him, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Isis Plumbing Co.*, 138 NLRB 710 (1962), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). With regard to the written warning notice, which was unlawfully given to Marcella Lopez Ruiz for assertedly violating its overly broad union solicitation rule, Respondent shall remove the warning notice, remove, from its files, any reference to the unlawful reprimand, and notify Lopez Ruiz, in writing, that such has been done and that the written warning will not be used against her in any way. Additionally, I shall recommend that Respondent be ordered to post a notice, setting forth its obligations.

[Recommended Order omitted from publication.]

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ployees and that, therefore, there is every likelihood that bargaining unit employees were made aware of Montes' unfair labor practices.

[35] I have considered counsel for Respondent's contention, that much of the unlawful conduct occurred prior to the original date of the representation election and, therefore, the effect of such was dissipated by the time of the second election, and reject it as ignoring the serious nature of Respondent's conduct. In particular, I point to the Judy Castillo's threats, in the fall of 1991 at employee meetings, of job loss and loss of hours and overtime if the employees selected the Union as their bargaining representative. Not only do I believe that her threats were widely disseminated among a group of unsophisticated workers but also such conduct must have had an utterly devastating effect on employees, who were dependent on receiving overtime pay and payment for an extra day of work as supplementary income. To contend that employees would not have recalled Castillo's warnings when they cast their ballots in May, I believe, is to ignore reality.

[36] In my view, whatever occurred subsequent to Respondent's refusal to place Pelayo back in his forklift position is only relevant for purposes of backpay and should be considered in any compliance proceeding.